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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. ~~940~~ 573

FREDERICK W. HUIDEKOPER, THOMAS W. SHANNON, JOHN M. DENNISON, GEORGE W. GILL, ALANSON A. SUMNER, CHANDLER ROBBINS, AND WILLIAM T. HICKOK, APPELLANTS,

vs.

THE HINCKLEY LOCOMOTIVE WORKS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 22, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 940.

FREDERICK W. HUIDEKOPER, THOMAS W. SHANNON, JOHN M. DENNISON, GEORGE W. GILL, ALANSON A. SUMNER, CHANDLER ROBBINS, AND WILLIAM T. HICKOK, APPELLANTS,

vs.

THE HINCKLEY LOCOMOTIVE WORKS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the twenty-eighth day of April, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence one hundred and first year.

WILLIAM H. BRADLEY, *Clerk.*

WILLIAM R. FOSDICK AND JAMES D. FISH
v.
CHICAGO, DANVILLE AND VINCENNES Railroad Company, James W. Elwell, and R. Biddle Roberts. } In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 20th day of May, A. D. 1875, in the record of the proceedings had in the circuit court of the United
2 States for the northern district of Illinois, at Chicago, in the district aforesaid, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

WILLIAM R. FOSDICK AND JAMES D. FISH
v.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company et al. } In chancery.

This cause came on to be heard, and after b. g argued by counsel, upon consideration by the court, it is ordered, adjudged, and decreed that Adna Anderson be, and he is hereby, appointed receiver herein, to take possession of the money and assets, real and personal, road-bed, road, iron, ties, lands, rights of way, mines, rolling-stock, leases, franchises, and all other rights and property, of whatever nature and kind, of the Chicago, Danville and Vincennes Railroad Company, wherever the same may be found within the State of Illinois, with power to manage, control, and exercise all the franchises and property whatever of the said railroad company within said State, and if need be, under the direcretion of the court, to sell, transfer, and convey the whole or any part of the property of said railroad company, and with power to prosecute and defend all suits brought by or against the said railroad
3 company, whether heretofore or hereafter commenced, whether in the name of said railroad company or otherwise, to defend all suits brought against him as such receiver or affecting his receivership, and to bring such suits in the name of said railroad company as he may be advised by counsel to be necessary and proper in the discharge of the duties of his office, and for acquiring, securing, and protecting the assets, franchises, property, and rights of the said railroad company.

And it is further ordered that the said defendant, The Chicago, Danville and Vincennes Railroad Company, and every other person or persons who have may or hold any part or portion of the property of said railroad company, by, through, or under the said company, or for its use and benefit, shall assign, transfer, and deliver over to said receiver all property, real, personal, and mixed, of the said railroad company, wheresoever found within the said State of Illinois, and all contracts in which said railroad company is interested, all the books, papers, vouchers, and evidences of indebtedness, money and assets of said company, and all

other effects of every kind, name, and nature which belong to said
4 company or are held for its use and benefit, or in which it has any beneficial interest.

It is further ordered, adjudged, and decreed that the said receiver have full power and authority to enquire, after, receive, and take possession of all said property, debts, equitable interests, things in action, and other effects, and for that purpose to examine the said defendant, The Chicago, Danville and Vincennes Railroad Company, and the officers of said company, and such other persons as he may deem proper, on oath, before Henry W. Bishop, master in chancery of this court, from time to time, as he may deem necessary.

It is further ordered, adjudged, and decreed that the said receiver keep a full and accurate account of his acts and doings as such receiver, and report the same to this court, from time to time, as he may be hereafter directed by the order of this court. And in the mean time, and until the further order of this court, to run, operate, and manage the said road, and pay the expenses thereof, and to manage and control all said property and affairs of said company.

And the said receiver is hereby empowered and authorized to employ such counsel and attorneys as he may deem necessary to manage
5 in his behalf such suits and other affairs as have or may arise, and to advise such receiver in relation to the performance of his duties therein.

It is further ordered, adjudged, and decreed that said receiver may use the moneys of the said defendant, The Chicago, Danville and Vincennes Railroad Company, for any and all of the purposes stated in this order.

It is further ordered, adjudged, and decreed that the said receiver shall, as speedily as possible, examine into the condition of the property and assets of the said road, its contracts, leases, running arrangements, its business and affairs, and take an inventory of its moveable property, and make a schedule of its floating indebtedness for labor and supplies, and report the same to this court as soon as may be, with his recommendations as to the proper disposition of the same and payment thereof.

It is further ordered, adjudged, and decreed that the said receiver, before entering upon any of his duties in this behalf, shall enter into bond in the penal sum of one hundred thousand dollars, with security to be approved by Henry W. Bishop, master in chancery of this
6 court, conditioned for the faithful performance of his duties as such receiver, and that he will duly account for and pay over, upon the order of this court, all moneys, properties, and effects which he shall receive by virtue of this order, and which shall remain from the operation and management of the said railroad property.

7 Afterwards, to wit, on the 14th day of September, A. D. 1875, said complainants, by their solicitors, filed in said clerk's office their amended bill of complaint in said entitled cause, which said amended bill is in the words and figures following, to wit:

Amended bill of complaint.

8 UNITED STATES OF AMERICA,
Nothern District of Illinois:

In the circuit court thereof, in chancery.

WILLLIAM R. FOSDICK AND JAMES D. FISH
vs.
CHICAGO, DANVILLE & VINCENNES RAILroad Company, James W. Elwell, and R. Biddle Roberts.

To the judges of said court, in chancery sitting:

William R. Fosdick and James D. Fish, who are each citizens of the State of New York, by leave of court first had and obtained, bring this their amended bill against the Chicago, Danville & Vincennes Railroad Company, James W. Elwell, and R. Biddle Roberts.

And thereupon your orators complain and say that the said railroad company was organized as a corporation under and by virtue of the laws of the State of Illinois, during the year A. D. 1865, and from thence hitherto has been and still is such corporation, and a citizen of the State of Illinois; and the said James W. Elwell is a citizen of the State of New York, and said R. Biddle Roberts is a citizen of the State of Illinois.

Complainants further allege that the said railroad company was organized under an act of the General Assembly of the State of Illinois, entitled "An act to incorporate the Chicago, Danville & Vincennes Railroad Company," approved February 16th, A. D. 1865, and from thence hitherto has been engaged in business, under and by virtue of the said act, at and within the northern district of Illinois; that said corporation was by its said charter, among other things, authorized and empowered to locate, construct, build, maintain, and operate a railroad, with single or double tracks, from a point in Lawrence County, on Wabash river, opposite Vincennes, in the State of Indiana, upon the
9 most eligible route to and into the city of Chicago, by way of Paris, in Edgar County, to Danville, in Vermillion County, and to lay out and locate their said road one hundred (100) feet in width through the whole length thereof; also to unite and consolidate its said railroad, stock, and property with that of any other railroad company or companies, within this or any other State, whose line or lines of road should cross or intersect the railroad authorized by said charter, or be built along or upon the line thereof, upon such terms as should be mutually agreed upon between said company and such other company, and to execute such contracts as should secure the object of such consolidation.

Complainants further allege that in and by said charter said railroad company was authorized to borrow money on the credit of said company, not exceeding its authorized capital stock, at a rate of interest not exceeding ten per cent. per annum, payable semi-annually, and to execute bonds therefor with interest coupons annexed, and to secure the payment of the same by mortgage or deed of trust upon the whole or any part of the said railroad and the income of the company then existing or thereafter to be acquired.

Complainants further allege that in and by said charter the directors of said corporation were authorized to negotiate and sell the bonds of

said company upon such terms and in such places, either within or without the State of Illinois, and at such rates and for such prices as in their opinion should best advance the interests of said company.

Complainants further allege that thereafter, and prior to the 10th day of March, 1869, the capital stock of said corporation was the sum of two million five hundred thousand dollars ($2,500,000); and that thereafter, and on the 10th day of March, A. D. 1869, the said corporation, for the purpose of constructing and putting in operation said line of railroad, caused to be executed, under the hand of its president and its corporate seal, twenty-five hundred bonds (2,500), numbered from one (1) to twenty-five hundred (2,500) inclusive, each for the sum of one thousand dollars ($1,000), payable in gold coin on the 1st day of April, in the year 1909, with interest at the rate of seven (7) per cent. per annum in gold coin, payable semi-annually, on the first days of April and October in each year, on delivery of said coupons, in the city of New York, at such place as should be designated by the company. A copy of one of said bonds and one of the interest coupons thereto annexed is attached to the original bill, and marked "Exhibit A"; and complainants refer to the said exhibit and make it a part of this their amended bill.

Your orators further show to your honors that for the purpose of securing the final payment of the said issue of twenty-five hundred bonds (2,500) with all the interest coupons thereto annexed, said corporation executed and delivered to the complainants, William R. Fosdick and James D. Fish, as trustees, a mortgage or deed of trust, conveying to them for the benefit of every holder of said bonds, or any of them, all the railroad of said company extending from Chicago, in Cook County, in the State of Illinois, southeasterly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, and thence southeasterly to a point on the State line of Indiana, and all its franchises, equipments, property, tolls, rents, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels connected with or used in the using or operating of said railroad or appertaining thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points, which said railroad company then had, owned, or possessed, or might thereafter acquire, either in law or equity, of every kind whatever appertaining thereto; a copy of which said mortgage is attached to the original bill in this cause, marked as "Exhibit B" thereof; to which said copy complainants refer, and make the same a part hereof.

Your orators further allege that said trust deed was duly executed under the hands of the president and secretary of said company, and under its corporate seal, and was on the 10th day of March, A. D. 1869, delivered to said trustees, who then and there accepted the trust thereby created and entered upon the performance of their duties as such trustees.

Your orators further allege that said trust deed, so executed and delivered to them as aforesaid, was thereafter, to wit, during the month of March, 1869, duly recorded in each of the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, in the State of Illinois, and then and there became and was a first lien upon all of the franchises and property of every kind, name, and nature whatever belonging to the said railroad company, or thereafter acquired by it within the said

counties, and all the line of railroad then built or thereafter to be built by the said company, within the said counties, between the city of Chicago, in the county of Cook, and Danville, in the county of Vermillion.

Your orators further allege that all of the said twenty-five hundred (2,500) bonds were certified by them as such trustees, and were thereafter sold and disposed of by the said corporation, and that all of said twenty-five hundred (2,500) bonds are now outstanding, and a valid and legal claim against the said corporation, and that the said trust deed securing the same is now a valid and subsisting first lien upon all of the property and franchises of the said company, within the counties aforesaid.

Your orators further allege that thereafter, and on the 4th day of March, A. D. 1872, the said Chicago, Danville & Vincennes Railroad Company entered into articles of consolidation with the Rossville
11 & Indiana Railroad Company, under and by virtue of which the said two corporations became and were a consolidated corporation by the name and style of the Chicago, Danville & Vincennes Railroad Company; a copy of the said articles of consolidation is attached to the original bill in this cause, as Exhibit C thereof, and is hereby referred to and made a part of this amended bill.

Your orators further show unto your honors that thereafter, and on the 9th day of March, A. D. 1872, said Chicago, Danville & Vincennes Railroad Company entered into certain articles of consolidation with the Western Indiana Railroad Company, under and by virtue of which the said two corporations became and were a consolidated corporation by the name and style of the Chicago, Danville & Vincennes Railroad Company; a copy of the said articles is attached to the original bill in this cause, as Exhibit D thereof, and is herein referred to and made a part of this bill.

Your orators further show to your honors that the said Western Indiana Railroad Company was, prior to the said last-mentioned consolidation, a corporation organized under the general laws of the State of Indiana; and that the said Chicago, Danville & Vincennes Railroad Company, by virtue of the said last-mentioned consolidation, became and was a corporation of the State of Indiana, as well as a corporation of the State of Illinois; and as such corporation in the State of Indiana became and was vested with the lawful power under the laws of said State to locate, construct, and operate a continuous line of railway, extending from the boundary between the States of Indiana and Illinois at a point in Warren County, southwardly, through the counties of Warren, Fountain, Park, and Clay, to the town of Brazil, in said Clay County, in the State of Indiana.

Your orators further show to your honors that thereafter, and on the 12th day of March, A. D. 1872, the said Chicago, Danville & Vincennes Railroad Company, for the purpose of aiding and providing the means required for the construction and equipment of the division of the road of said company lying and being in the State of Indiana, caused to be executed its bonds, amounting to one million five hundred thousand dollars ($1,500,000), being fifteen hundred (1,500) bonds of one thousand dollars ($1,000) each, payable forty (40) years after date, with interest at the rate of seven per cent. per annum, payable on the first days of April and October of each year, both principal and interest payable in American gold coin; which said last mentioned bonds were numbered from 2,501 to 4,000 inclusive, and had attached thereto interest coupons; which said bonds and coupons were of the same form as the twenty-five hundred (2,500) bonds hereinbefore mentioned and described.

Your orators further show to your honors that for the purpose of securing the payment of the said bonds and coupons thereto annexed, in accordance with the tenor and effect thereof, the said railroad company, on the said 12th day of March, A. D. 1872, executed and
12 delivered to your orators, William R. Fosdick and James D. Fish, its certain mortgage or trust deed, in and by which the said railroad company conveyed to the said trustees the entire division of the railroad of the party of the first part, situated, lying, and being in the State of Indiana, commencing on the boundary line between the States of Illinois and Indiana, in the township of Marshfield and county of Warren, in the State of Indiana, at the point where it connects with the road of the said railroad company, terminating on the eastern boundary line of the State of Illinois, in the town of Ross, in Vermillion County, in said State of Illinois, and distant about ten miles southeasterly from the village of Rossville, and extending thence in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Park County; thence southerly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also a branch road, extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg, in said county. The entire length of road being about eighty (80) miles; and also all such additional branch roads as said railroad company should thereafter construct for the purpose of extending its track into the coal and mining regions in the vicinity of said main line road; with all its franchises, equipments, property, tolls, issues and profits, and all its lands, tenements, buildings, fixtures, machinery, goods and chattels connected with or used in the using or operating the said railroad, or appertaining thereto, and all its rails, ties, fuel, fencing and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said railroad company then had, owned, and possessed, or might thereafter acquire, either in law or equity, of every kind whatever, appertaining thereto; a copy of the said mortgage is hereto attached, marked "Exhibit F," and made a part of this amended bill.

Your orators further show to your honors that the said mortgage, so executed as aforesaid, was thereafter, to wit, on the said 12th day of March, A. D. 1872, delivered to your orators, as trustees; they then and there accepted the trust thereby created, and entered upon the performance of their duties as said trustees; and thereafter, to wit, on the day and year aforesaid, as such trustees, they duly certified all of the said fifteen hundred bonds, and a large portion thereof were thereafter sold by the said company; and the remainder thereof, as these complainants are advised and believe, were hypothecated by the said company as collateral to certain indebtedness thereof; and all of the said fifteen hundred (1,500) bonds are now outstanding and valid obligations of the railroad company.

13 Your orators further allege that the said mortgage was thereafter, to wit, during the said month of March, A. D. 1872, duly recorded in each of the counties of Warren, Fountain, Park, and Clay, in the State of Indiana, and then and there became, and was, a first lien upon all the property and franchises of the said railroad company within the said counties in said State of Indiana.

Your orators further show unto your honors that the said Chicago,

Danville & Vincennes Railroad Company thereafter, and on the 24th day of April, A. D. 1872, for the purpose of further securing the prompt payment of all of the said two issues of bonds, in all amounting to four thousand bonds (4,000), and the coupons thereto annexed, executed and delivered unto your orators, as trustees, a certain mortgage, or deed of trust, in and by which they then and there conveyed to your orators, as such trustees, all of the said line of railroad, then built, or thereafter to be built, in the State of Indiana, together with the franchises, appurtenances, equipments, property, tolls, issues, and profits thereof, as additional security for the payment of said bonds, numbered from one (1) to twenty-five hundred (2,500), both inclusive, together with the coupons thereto annexed; and in and by said mortgage the said company also conveyed to your orators, as trustees, the entire railroad of the said company, lying, being, and extending from its terminus, in the city of Chicago, in Cook County, Illinois, southerly, through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, being in length about one hundred and thirty miles (130), and all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods and chattels, and all its rails, ties, fuel, fences, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions, of every nature and kind whatever, including all the property between said terminal points which said railroad company then had or should thereafter acquire, as additional security for the payment of said bonds numbered from 2,501 to 4,000, inclusive, together with the coupons thereto attached.

Your orators further show to your honors that the said last-mentioned mortgage was thereafter, to wit, on the 24th day of April, 1872, delivered to your orators as trustees; they then and there accepted the same as additional security for the payment of the said bonds in manner and form as aforesaid; and they allege that, under and by virtue of the terms and conditions of the said mortgage, the said bonds, numbered from one (1) to twenty-five hundred (2,500), inclusive, became, and were, a second lien upon all of the Indiana division of the said railroad then in course of construction and thereafter to be constructed, together with all of the franchises, equipments, and appurtenances thereof; and that the said bonds, numbered from twenty-five hundred and one (2,501) to four thousand (4,000), inclusive, became, and were, a second lien upon
14 all of the Illinois division of the said railroad, together with the franchises, equipments, and appurtenances thereof, as by the said mortgage, a copy of which is hereto attached, marked "Exhibit G," and made a part hereof, will more fully and at large appear.

Your orators further show unto your honors that thereafter, and on the 16th day of May, 1872, the said Chicago, Danville & Vincennes Railroad Company entered into certain articles of consolidation with the Attica & Terre Haute Railroad Company, under and by virtue of which the said two corporations became a consolidated corporation by the name and style of the Chicago, Danville & Vincennes Railroad Company, a copy of which articles of consolidation is attached to the original bill in this cause as Exhibit E thereof, and are hereby referred to and made a part of this amended bill.

And your orators further allege that the said railroad company proceeded with the construction of its line of railroad in the States of Indiana and Illinois, and have constructed and put in operation a large portion of the line thereof, and that the said line, as now constructed and operated within the State of Illinois, commences at Dalton, about

twenty (20) miles south of the city of Chicago, and runs thence southerly, to Danville, in Vermillion County, a distance of one hundred and eight (108) miles, with a branch from Bismark, in Vermillion County, to the east line of the State of Illinois, a distance of about seven (7) miles, in all a distance within said State of about one hundred and fifteen (115) miles.

Your orators further allege that said railroad company runs its cars from near Dalton into the city of Chicago, over the line of the Chicago & Southern Railway, a distance of about twenty-one (21) miles; that it also uses a portion of the line of the Pittsburg, Cincinnati & St Louis Railway, within and near the city of Chicago; and within said city the said company uses and maintains side tracks and appurtenances of its own.

Your orators further allege that, within the State of Indiana, the said company has constructed its line of railroad from the State line, between the States of Indiana and Illinois, at a point where the Bismark branch of the Illinois division intersects the line between the States of Indiana and Illinois, to Snoddy's Mills, a distance of eighteen (18) miles between said points, and has constructed various branches to coal mines, in all about five (5) miles. From Snoddy's Mills to Montezuma, a distance of about eighteen (18) miles, your orators are informed and believe, and charge the fact to be, that the said company has procured the right of way and has finished about twenty (20) per cent. of the grading; from Montezuma to Brazil coal field, a distance of twenty five (25) miles, your orators are informed and believe, and, therefore, charge, that said company has procured the right of way and finished about eighty-five (85) per cent. of the grading, and all of the bridging, and has laid about two miles of the track, the total length of line from the State line to the Brazil coal fields being about sixty-one (61) miles. That the said portion of said road within the State of Indiana is known as the Indiana division thereof, and the portion within the State of Illinois as the Illinois division thereof.

Your orators further allege that said railroad company has paid all of the coupons maturing upon said Illinois division bonds, and said Indiana division bonds, up to and including the coupons maturing on the first day of April, 1873, and that none of the coupons maturing since that time, or any part thereof, have ever been paid, but the said company, though often requested, has never paid the same, but so to do has made default.

Your orators further show to your honors that after said railroad company had made default in the payment of the coupons of the said bonds maturing October 1st, 1873, and, to wit, on the 11th day of November, 1873, the said railroad company issued a circular to its bondholders, in and by which it proposed that the holders of bonds should deposit with your orators, William R. Fosdick, as trustee, the coupons due October 1st, 1873, April 1st, 1874, October 1st, 1874, and April 1st, 1875, and receive in exchange therefor the convertible bonds of said railroad company dated January 1st, 1873, payable February 1st, 1893, bearing interest at seven (7) per cent. per annum, with coupons payable the 1st of February and August of each year, principal and interest in gold: said bonds to bear interest from February 1st, 1874, and to be received by the bondholders at seventy-five (75) per cent. of their par value; also scrip certificates bearing interest the same as the bonds, to be issued for fractional sums, and exchangeable for the convertible bonds when presented in sums of five hundred (500) or one thousand (1,000) dollars; the coupons thus deposited in trust were to be held by

the trustee until October 1st, 1876, after which the coupons were to be cancelled by the trustee and surrendered to the company; but in case of non-payment of any coupons becoming due up to October 1st, 1876, the coupons deposited with the trustee were to be surrendered to the original owners upon the return of the second mortgage bonds, or scrip certificates which had been issued for them.

Your orators further allege that, in response to said proposition, coupons to a considerable amount were delivered to said special trustee, and there were issued in lieu thereof forty-four (44) convertible bonds of one thousand (1,000) dollars each, and twenty-eight (28) convertible bonds of twenty-five hundred (2,500) dollars each, and about thirty-five hundred (3,500) dollars of scrip certificates for fractional sums less than five hundred (500) dollars.

Your orators further show to your honors that thereafter, and on or about the 20th of November, 1873, the said railroad company issued to its said bondholders another circular, which proposed the following scheme: That the bondholders should deposit the four coupons, from October 1st, 1873, to April 1st, 1875, inclusive, with your orator,
16 William R. Fosdick, as trustee, and should receive and exchange therefor certificates of indebtedness, payable in five (5) years from February 1st, 1874, with interest payable semi-annually, on the first days of February and August of each year, principal and interest payable in gold, the coupons to be held by the trustee until after the maturity of the certificate of indebtedness, on the 1st of February, 1879, when they were to be cancelled by said trustee, and surrendered to the company; but in the case of the non-payment of the interest or the principal of the certificate at maturity, or of the coupons on the first mortgage bonds, between October 1st, 1875, and February 1st, 1879, both inclusive, then the coupons were to be returned to the original owners, upon surrender of the certificates, with all their original rights to proceed against the company unimpaired.

Your orators further allege that the holders of two million eight hundred and one thousand (2,801,000) dollars of the said four thousand (4,000) bonds of one thousand (1,000) each accepted one or the other of the two propositions hereinbefore set forth, and that under the last mentioned proposition there were issued certificates of indebtedness amounting to three hundred and forty-seven thousand nine hundred (347,900) dollars, which said certificates were all of the same form, and your orators hereto attach a blank certificate, with coupons annexed, marked "Exhibit H," and make it a part of this their amended bill.

Your orator further shows unto your honors that the convertible bonds mentioned in said first proposition were part of an issue of bonds of said company to the amount of one million of dollars ($1,000,000), dated January 1st, 1873, due February 1st, 1893, with interest at seven (7) per cent. per annum, payable semi-annually, principal and interest payable in gold coin, which said bonds were secured by a certain deed of trust, dated the 16th day of December, 1872, in and by which the said railroad company conveyed to James D. Fish and James W. Elwell, of the city of New York, as trustees, all of its line of railroad in each of the States of Illinois and Indiana, with all of the franchises, equipments, property, and appurtenances thereof, a copy of which mortgage is hereto attached, marked "Exhibit I," and made a part hereof.

Your orators further aver that the said James D. Fish, named as one of the trustees in the said convertible mortgage, has declined to perform the duties of trustee under said mortgage, and has resigned the said office, and that the said defendant, James W. Elwell, whose appear-

ance has heretofore been entered in this cause, is the sole remaining trustee under the said mortgage.

And your orators allege that the said convertible mortgage is in all respects subject to the three mortgages hereinbefore mentioned and described, to wit, the Illinois division, dated March 10th, 1869, which is a first lien upon all of the Illinois division of the said railroad;
17 the Indiana division mortgage, dated March 12, 1872, which is a first lien upon all of the Indiana division of said road; and the supplemental mortgage, dated April 24, 1872, which is a second lien upon the entire line of said railroad. And your orators aver that the said convertible mortgage is, as they are advised and believe, only a third lien upon said line of railroad in the States of Indiana and Illinois.

Your orators further allege that they are informed and believe that only about one hundred and seventy thousand ($170,000) of the said convertible bonds have been sold by the said railroad company; that about seven hundred and eighty-five thousand ($785,000) dollars of said bonds have been hypothecated as collateral to certain of the floating indebtedness of said company, and that about forty-five thousand ($45,000) dollars of said bonds have not been issued at all.

Your orators further show unto your honors that the said railroad company failed to pay all the coupons upon said certificates of indebtedness due February 22d, 1872, and that said company has not paid any of the coupons upon said certificates of indebtedness which fell due on the first day of August, 1875.

Your orators further show to your honors that they are advised and believe that the said railroad company have never paid any of the coupons upon any of the four millions ($4,000,000) of bonds which were not funded as aforesaid, and which matured on and subsequent to October 1st, 1873, and that all of said coupons, to wit, the coupons upon one million one hundred and ninety-nine thousand dollars ($1,199,000) of said bonds have long since become due and remain wholly unpaid and unsatisfied, and that the owners thereof have never in any way consented to the said default.

Your orators further aver that they are informed and believe, and therefore charge the fact to be, that the said railroad company are wholly unable to pay any of said overdue coupons upon the said four thousand (4,000) bonds on the said overdue coupons upon said certificates of indebtedness, or the said coupons upon the said convertible bonds which were delivered to coupon holders in lieu of the coupons falling due October 1, 1873, April 1, 1874, October 1, 1874, and April 1st, 1875, but that said company is insolvent, and has a floating indebtedness of about the sum of eight hundred and fifty thousand dollars, which it is wholly unable to pay, a large portion of which floating indebtedness is secured by the hypothecation of the convertible bonds hereinbefore mentioned as collateral thereto, and a portion of which has been prosecuted to judgment and execution.

And your orators further show to your honors that heretofore, and on or about the 12th day of January, A. D. 1875, the said railroad company made a further issue of currency bonds to the amount of one million ($1,000,000) dollars, due January 12, 1877, and to secure the
18 same executed and delivered to the defendant, R. Biddle Roberts, who is a citizen of the State of Illinois, and a resident of the city of Chicago, in said State, a certain instrument in writing commonly called a chattel mortgage, a copy of which, marked "Exhibit K," is hereto attached and made a part of this bill, which said instrument

purporting to convey, assign, and mortgage to the said Roberts divers engines, cars, tools, and machinery, more specifically described and specified in said instrument, and which, as your orators are informed and believe, covers the whole or the greater part of all the equipment which belongs to and is used on the said line of railroad.

And your orators allege that the said instrument was not executed, acknowledged, and filed for record as provided by law, and that the same is, as they are advised and believe, null and void.

And your orators further allege that if the said instrument had been so executed, acknowledged, and recorded as to become a valid and binding chattel-mortgage upon the property therein described, the same would have been in all respects subject to each of the three mortgages hereinbefore described, and dated March 10, 1869, March 12, 1872, and April 24, 1872, and that the same is in fact in all respects subject to the said three mortgages so given to your orators as aforesaid.

Your orators further show to your honors that they are informed and believe that none of the said chattel mortgage bonds have ever been sold by said company, but that the same, to the amount of nine hundred and thirty-six thousand ($936,000) dollars, have been put in the hands of various holders of the floating indebtedness of said company as collateral thereto, and that said bonds to the amount of sixty-four thousand ($64,000) dollars have never been issued at all.

Your orators further allege that, by reason of the insolvency of said company, it will be utterly impossible for the said company to fulfill the terms and conditions of the certificates of indebtedness hereinbefore described, and issued by the president of said company, or to pay the coupons attached thereto, and that by reason thereof, and in consequence of the default of said company in payment of the coupons attached to said certificates of indebtedness, the owners of the unpaid coupons of the said four millions (4,000,000) of bonds are entitled to rescind the said funding arrangement, and to demand and enforce payment of the said coupons so funded as aforesaid.

And your orators further allege that, by reason of the default of said company in the payment of the coupons due October 1, 1873, and subsequent thereto, which have never been funded, the principal of all of the said bonds has, by the terms and conditions of the mortgage securing the same, become due and payable, and all of the said Illinois division bonds, and of the said Indiana division bonds, were, by the terms and conditions of the mortgage securing the same, and in
19 consequence of the defaults aforesaid, due and payable prior to the commencement of this suit.

Your orators further allege that of the said Illinois division bonds six hundred and ninety-eight thousand dollars thereof have never been funded by the holders thereof, and the holders thereof have never in any way consented to the conditions of the default in the payment of interest thereon.

Your orators allege that they have been requested by the holders of a majority of said Illinois division, and also by the holders of a large number of the said Indiana bonds, to proceed to collect the principal and interest of said bonds by foreclosure and sale of all of the railroad, franchises, property, and appurtenances of said company, within the State of Illinois.

Your orators further allege that said Indiana division is wholly insufficient to secure the payment of the said Indiana division bonds in full, and that said Illinois division of said road is more than sufficient to secure the payment of said Illinois division bonds in full, but is not suf-

ficient security for the payment in full of the whole of the Indiana division bonds, after the said Illinois division bonds have been first paid out of the proceeds thereof.

Inasmuch, therefore, as your orators have suffered loss and damage in the premises, and are remediless, except in equity, where matters of this kind are properly cognizable and relievable, they pray that the said Chicago, Danville and Vincennes Railroad Company, and the said James W. Elwell, whose appearance have already been entered in this cause as parties defendant thereto, may be required to answer this your orators' amended bill, but without oath, which is hereby expressly waived, and that the said R. Biddle Roberts may be made party defendant hereto, and summoned to answer this your orators' bill, but without oath, which is hereby expressly waived; and that the receiver heretofore appointed upon the prayer of the original bill in this cause may still hold the said railroad, its equipment and appurtenances, and operate the same under the order and direction of this honorable court; and that an account be taken of the amount due by the said railroad company upon the said Illinois division bonds and upon the said Indiana division bonds separately, and that the said railroad company be ordered to pay the amount so found due upon said bonds, severally, within a short time, to be limited by this honorable court, and that upon default thereof the said Illinois division of the said railroad, together with all of the franchises, equipment, and appurtenances thereof, may be sold by the master in chancery of this court, for the payment, first, of the said twenty-five hundred (2,500) Illinois division bonds; and secondly, of the fifteen hundred (1,500) Indiana division bonds, which are the first and second leins upon the said Illinois division of said railroad, its equipments, franchise, and property, as hereinbefore set forth, or for such other and further relief as to your honors shall seem meet and to equity shall appertain.

WILLIAM R. FOSDICK AND
JAMES D. FISH,
Trustees,
By GEO. C. CAMPBELL, *their Solicitor.*
LAWRENCE, CAMPBELL & LAWRENCE, *of Counsel.*

EXHIBIT A.

Form of bond.

UNITED STATES OF AMERICA, STATE OF ILLINOIS.

Chicago, Danville and Vincennes Railroad Company.

First mortgage seven per cent. sinking fund bond, principal and interest payable in gold.

No. .] [$1,000.

Know all men by these presents that the Chicago, Danville and Vincennes Railroad Company, a corporation existing under the laws of the State of Illinois, for value received, acknowledges itself indebted to Joseph E. Young in the sum of one thousand dollars, in United States gold coin at par, which it promises to pay in the city of New York to him or bearer, on the first day of April, in the year one thousand nine hundred and nine, with interest at the rate of seven per centum per annum, in gold coin as aforesaid, payable semi-annually, on the first

days of April and October in each year, on the delivery of the annexed interest warrants, in the city of New York, at such place as may be designated by said company by advertisement published in said city.

This bond, with others of like tenor and date, amounting, in the aggregate, to a sum not exceeding two millions and five hundred thousand dollars, is secured by a mortgage on the railroad, franchises, income, equipments, and property of said company, duly made and delivered to trustees, whose names are signed to the certificate of authentication of this bond, for the benefit of the holder hereof, dated the tenth day of March, one thousand eight hundred and sixty-nine, and duly recorded.

This bond is entitled to all the benefit to be derived from a sinking fund, to be annually created and invested as provided for in the deed of trust or mortgage above referred to. And it is agreed between said company and the holder of this bond that no recourse shall be had for its payment to the individual liability of any stockholder of said
21 company; and that in case of any default in the payment hereof, the said company hereby waives the benefit of any extension, stay, or appraisement laws now existing or that may hereafter exist.

This bond shall pass by delivery or by transfer on the books of the company, in the city of New Nork. After a registration of ownership, certified hereon by the transfer-agent of the company, no transfer, exkept on the books of the company, shall be valid, unless the last transfer be made to bearer by the transfer-agent of the company, which shall restore transferability by delivery; but this bond shall continue subject to successive registrations and transfers to bearer as aforesaid, at the option of each holder.

This bond shall not be valid or obligatory until it shall have been authenticated by a certificate endorsed hereon, and duly signed by the trustees under the mortgage aforesaid.

In witness whereof the said company have caused the foregoing to be attested in its behalf by its president and secretary, and its corporate seal to be affixed hereto, and the interest-warrants hereto annexed to be signed by its secretary, at the city of Chicago, in the State of Illinois, this tenth day of March, eighteen hundred and sixty-nine.

President.

Secretary.

(Coupons.)

$35.

The Chicago, Danville and Vincennes Railroad Company will pay the bearer, at its agency in the city of New York, thirty-five dollars in coin, on the first day of , A. D. , for semi-annual interest on its first-mortgage bond, No.

Secretary.

(Endorsement.)

No. . Chicago, Danville and Vincennes Railroad Company. Seven per cent. sinking fund-bond. $1,000. Principal and interest payable in United States gold coin at par. Principal payable April 1st, 1909. Interest payable April 1st and October 1st, in New York.

(Trustees' certificate.)

We certify that this bond is one of a series amounting to $2,500,000, described in and secured by the deed of trust or mortgage mentioned herein, bearing date March 10th, 1869, which is recorded according to law.

Trustees.

22 EXHIBIT B.

Form of mortgage.

This indenture, made this tenth day of March, in the year one thousand eight hundred and sixty-nine, between the Chicago, Danville and Vincennes Railroad Company, a corporation of the State of Illinois, party of the first part, and William R. Fosdick and James D. Fish, of the city and State of New York, trustees, upon certain trusts hereinafter specified and provided, the party of the second part:

Whereas the Chicago, Danville and Vincennes Railroad Company, a corporation of the State of Illinois, under and in pursuance of the provisions of the act incorporating the same, has commenced to construct and put in operation a railroad from Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, and then southeasterly to a point on the State line of Indiana, joining and connecting at said point with the Evansville, Terre Haute and Chicago Railroad, and is now engaged in constructing the same;

And for the purpose aforesaid, needs, and has resolved to purchase and transport iron rails, chairs, spikes, and other iron and materials necessary therefor, and engines, cars, and other rolling stock and machinery to be used thereon; and to borrow a portion of the money necessary to make such purchases and to pay for such transportation, and the construction, completion, and equipment of said road;

And whereas, at a meeting of the board of directors of the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, held pursuant to law, on the second day of February, in the year 1869, the said board of directors resolved and enacted an order and resolutions as follows, to wit:

"Resolved, That, to aid in providing the means required for the construction and equipment of this company's road, an issue of bonds shall be made by the company, amounting to two millions and five hundred thousand dollars, each bond to be for the sum of $1,000, and to bear seven per cent. per annum interest, payable semi-annually, on the first days of April and October in each year, and the principal to be payable on the first day of April, 1909, and both principal and interest to be payable in United States gold coin, at par, in the city of New York; and each bond to contain an express waiver of all recourse by the holder of the same to any individual liability of the stockholders of this company.

"That said bonds shall be dated as made on the tenth day of March, A. D. 1869.

"In case default be made in the payment of any half year's interest of said bonds, and the warrant for said interest shall have been
23 presented and its payment demanded, and such default shall have continued for six months after such demand, without the

consent of the holder of said coupon or bond then and thereupon, the principal all such bonds shall become immediately due and payable. That a warrant for each semi-annual payment of interest shall be made and authenticated, for and on behalf of this company, by the secretary of this company, and annexed to each bond. That said bonds shall be prepared by the president of the company, and signed by him for and on behalf of this company, and attested by the secretary, and shall have annexed to them a certificate of authentication of the trustee or trustees, under the mortgage made to secure them, and shall not be issued or obligatory without such certificate.

"That from and after the first day of April, A. D. 1873, and until the maturity of said bonds, there shall be annually created, paid, and deposited with a sinking-fund commissioner or commissioners, to be appointed by the board of directors, and to hold office at the pleasure of the board, a sinking fund, to aid in the final redemption of said bonds, of an amount of money derived from the net earnings of said road and property equal to one-half of one per cent. on the whole amount of said issue of bonds at the time of any such payment outstanding. Said fund, and all investments and accounts thereof, and its management, shall always be under the control of this board, and shall be from time to time continually invested by the commissioner or commissioners in the purchase of said bonds or bonds of the Government of the United States, or of the State of Illinois; and the interest on all such investments, as collected, shall be added to and continually compounded with said fund, and the same shall be used and appropriated solely to redeem and eventually pay off said issue of bonds hereby provided to be made.

"No bond of said issue purchased by said fund shall thereby be canceled, but shall, with its coupons, be stamped as owned by said sinking fund, and it, or its amount if destroyed, shall remain a liability against the company, and the interest shall be paid to the said sinking fund the same as paid on other bonds, and shall be added to said fund until the whole of said issue of bonds shall have been absorbed or otherwise paid off, when the whole issue shall be canceled. Any bonds of said issue which may be in said sinking fund at any time may be destroyed by order of the board of directors of said company; but in such case the semi-annually accruing interest on the amount so destroyed must thereafter be paid to said sinking fund. The bonds and securities belonging to the sinking fund shall be kept in the office of the sinking-fund commissioner or commissioners, which shall be at or near the principal office of said railroad company.

"That for the purpose of securing the final payment of said issue of $2,500,000 of bonds, with all interest to accrue thereon, this company
24 will make and deliver to William R. Fosdick and James D. Fish, as trustees, a mortgage and deed of trust, conveying to said persons as trustees, for the benefit of every holder of such bonds, or any of them, all the road of this company, extending from Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, and thence southeasterly to a point on the State line of Indiana, where it will join and connect with the *the* Evansville, Terre Haute and Chicago Railroad, with all the property, rights, and franchises of this company of every kind and description whatever, pertinent to said road between said terminal points, and all the income to be had and derived from operating the same, in trust, to secure the final payment of said bonds as aforesaid, with all the rights, covenants, powers, and authority, in case default be made by this company in such payments as in said deed of trust shall be speci-

fied, to foreclose said mortgage, and to sell the property so mortgaged, or to take possession of and operate the same, and receive the incomes thereof; but not in any case, before any default, to disturb or interfere with this company in the possession, control, and management thereof, or from receiving the incomes thereof, or from selling or exchanging any of the personal property, or machinery, or equipments thereof, or any of the lands or real estate not necessary for the use and operation of the railroad; as to all of which, as will be in said mortgage and deed of trust specifically stated, agreed upon, and set forth.

"That the president of this company is hereby authorized and fully empowered to make and sign, and execute and seal with the corporate seal of this company, the said mortgage and deed of trust, and to acknowledge the same for and on behalf of this company for record; and on the acceptance of said trust, and signing the said deed by the said trustees, to cause the same to be recorded according to law, and thereupon to make, sign, execute, and prepare said $2,500,000 of bonds for issue and sale, as shall be hereafter ordered by this board."

And whereas the said Chicago, Danville and Vincennes Railroad Company, party of the first part, hath, in accordance with the provisions of said order and resolution, made and executed bonds to the amount of two millions and five hundred thousand dollars, of the form, denomination, and character prescribed by said order and resolution, and hold the same to be authenticated, issued, used, and disposed of for the purposes in said order and resolution stated:

Now, therefore, in further pursuance of said order and resolution, and to the end and purpose of securing and assuring the punctual payment of said two millions and five hundred thousand dollars of bonds, and every part thereof which may be issued, to persons who may become the holders of the same, or any of them:

This indenture witnesseth that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the said party of the second part, trustees aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, doth hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the said William R. Fosdick and James D. Fish, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire railroad of the party of the first part, lying, being, and extending from its terminus, in the city of Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, and thence southeasterly to a point on the State line of Indiana, joining and connecting at said point with the Evansville, Terre Haute and Chicago Railroad, being in length about one hundred and forty miles, with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever, pertinent thereto.

Provided, however, that this grant and conveyance aforesaid shall not include, nor operate to transfer any lands, goods, chattels, property,

machinery, equipment, or other matters, which said company now owns, or may hereafter acquire, that need not be used for any purpose incident to the management or operation of said railway, or the repair thereof, or in the business of said railway company; nor any franchises, power, or corporate right to build that portion of the line of railroad which, by its charter, it is authorized to locate and construct, and not embraced within the terminal points hereinbefore described; but all which last-mentioned franchises and right of way shall be wholly excepted and exempt from these presents, and the grant and conveyance herein specified; nor shall these presents in any way prohibit the party of the first part from selling and conveying, or otherwise disposing of the same, and all the proceeds thereof; nor from receiving, using, and applying any money or personal property of said company to the repairs of said road or its appurtenances, or to its current expenses, or to the purchase of necessary machinery, or the renewal thereof; and the board of directors of said company may likewise distribute and pay any net annual incomes and profits to stockholders, after paying the interest on the said bonds, and providing for any sinking fund required to be created and
26 kept. To have and to hold the said railway property, premises, interests, rights, and appurtenances mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance, unto the said party of the second part, as such trustees as aforesaid, and to their successors in said trust, or assigns, to and for the only use, benefit, and behoof of the said trustees, and their *cestui que trust*, their successors and assigns, forever; but in special trust and confidence, and upon the conditions following, that is to say:

1st. That this conveyance is for, and shall be by the said party of the second part, their successors and assigns, held, used, and owned solely for the benefit and protection and security of the persons and corporations who shall hold and own the bonds about to be issued as aforesaid, by the party of the first part, and for enforcing the stipulations of said company as to said issue of bonds, and the disposal thereof and securing the same, and the final payment thereof in their true intent and meaning, whether contained in said bonds, or the interest warrants attached to them, or in this deed.

2d. That for the better assuring and confirming the title and powers of the said party of the second part, their successors and assigns, in the said premises and property hereby conveyed, and in and to any premises and property or rights hereafter accruing, or to be acquired by said party of the first part, appurtenant to said railroad, which is intended to pass or be passed by this conveyance, the said party of the first part, their successors and assigns, will and shall, as often as may be lawfully required by the party of the second part, or their successors or assigns, holding the above-granted trust, do such acts and make such other and further conveyances and assurances in law as such party of the second part shall, by counsel learned in the law, be advised are necessary for the better carrying out of the object of the parties to this mortgage or deed of trust.

3d. That if the said party of the first part, their successors or assigns, shall well and truly pay to the holders of said two millions and five hundred thousand dollars of bonds, so to be issued and hereby secured, the respective sums of money and interest due and accruing on said bonds on the days and times therein mentioned, and according to the tenor and effect of said bonds, then and thenceforth this indenture, and all the estate hereby granted, shall become and be utterly void and of no further effect; and the same shall be, by such payment, wholly an-

nulled and satisfied, without any further receipt or entry of satisfaction of record whatever, but shall be, if required, entered and certified on any record of the same as so satisfied by the party of the second part, or their successors.

4th. That until default shall have been made by the party of the first part in the payment of principal or interest of the said bonds, or some of them, or until default shall have been made in respect to some-
27 thing herein required to be done by the said party of the first part, the said party of the first part shall be suffered and permitted to possess, use, occupy, manage, and operate the said railroad property and franchises, and appurtenances, and to renew, replace, and repair the same, and every part thereof, and take and receive, and use the tolls, rents, issues, incomes, and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

5th. In case default shall be made in the payment of any interest, on any of the aforesaid bonds issued or to be issued, according to the tenor of the coupons thereto annexed, or of the provisions hereof; or, in case default shall be made in the payment of the principal of said bonds, or any of them, when the same shall become due, without the consent of the holder of such bond on which such default shall occur, the said party of the first part hereby covenants and agrees to and with the party of the second part, and their successors and assigns, that within six months after such default shall have occurred, the same default still continuing, the said party of the first part, on demand of the said trustee or trustees for the time being, shall and will surrender to him or them, or to their agent, the actual possession of the herein granted and demised railroad and premises, together with all the books, records, papers, accounts, and money of said company, and all management and control thereof; and that all the expenses of taking, holding, managing, and operating said property, if possession be so taken, shall be paid from the incomes and profits thereof; and if said property shall, after such taking possession thereof, be sold, then from the sale thereof; or such expenses may be paid from the sale of any personal property, as the said trustees may deem proper; and that said party of the second part and their successors, having taken such possession, may manage, operate, and control said road and property and all of its affairs, and appoint all needful agents and employees for that purpose, and pay the same, and receive all the incomes, issues, and profits thereof, and apply the same to the payment of the said interest so in default, according to the true intent and tenor of the said bonds and the coupons annexed, and to the terms of this deed, until such default shall have been satisfied, if such incomes and profits will satisfy the same, first paying all expenses of such possession and management, and all taxes, assessments, and charges on said property, and a just compensation for their own services as such trustees. But in any and all cases of such taking of possession by said party of the second part, and paying up any such default, and the expenses aforesaid, the said party of the second part shall immediately thereafter redeliver the said railway and premises, books, records, and money and accounts into the possession of the party of the first part; provided, that no such demand for such possession shall be made by said trustee or trustees, until they shall have been required by the holders of at least the one-half of all of the said issue of bonds which shall
28 then be unpaid and outstanding to make such demand, and to take such possession of said railroad and property.

6th. That in case default shall be made as aforesaid, and shall continue as aforesaid, it shall be lawful for the party of the second part, or

their successors in said trust, after entry as aforesaid, or other entry, or without entry, personally, or by agent or attorney, to sell and dispose of to the highest bidder, all and singular the premises hereby conveyed or intended so to be, as an entirety at public auction, in the city of Chicago, State of Illinois, at such time as said party of the second part may appoint, first having demanded of the party of the first part full payment of all money then in default; and also first having given sixty days' notice of such time and place of sale, and a full description of the property so to be sold, by advertisement thereof in two newspapers, one published in Chicago, in the State of Illinois, and one published in the city of New York; and to adjourn said sale from time to time, in their discretion, and, if adjourned, to make such sale in manner aforesaid without further notice, at the time and place to which it may be so adjourned; and upon such sale, and receiving the purchase money therefor, to convey the same, by good and sufficient conveyances, to the purchaser or purchasers; and such sale and conveyance so made shall convey all the right, title, estate, interest, and property of the said party of the first part, of, in, and to the said road, premises, franchises, and property to the said purchaser in fee-simple forever; and shall be a perpetual bar, both in law and equity, against the said party of the first part and their successors and assigns, and against all and every person claiming or to claim the said premises, or any part thereof, under them, forever. After deducting from the proceeds of such sale the expenses of the sale and conveyance, and all advances or liabilities which may have been made or incurred by the party of the second part in operating and controlling and maintaining the said railroad and property, and in managing its business and affairs while in possession, and all payments for taxes, charges, and assessments on said premises or any part thereof, as well as reasonable compensation for their own services, to apply the proceeds of such sale to the payment of the interest of said two millions and five hundred thousand dollars of bonds, or so many of them as shall have been issued by said party of the first part and be then outstanding, pro rata until all such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds pro rata until such principal shall be paid; and if any surplus remain after paying all of said matters, to pay such surplus to the party of the first part; and such payments shall be so made on said bonds, whether the same shall have become due or not at the time of such sale; provided, that said trustee or trustees may, in their discretion, sell the said premises as an entirety, and on doing so shall make legal distribution of the proceeds of such sale accordingly.

29 It is hereby declared that the receipt of said trustee or trustees, making any such sale to the purchaser of the premises for the purchase money, shall be a full and sufficient discharge of such purchaser therefor, and that said purchaser shall not after payment of said purchase money, and obtaining such receipt therefor, be liable, or in any way bound, to see said purchase money applied to this trust, or otherwise or in any manner answerable for its loss or misapplication, or obliged to inquire into the authority for making such sale.

7th. At any sale of the property aforesaid, or any part thereof, made by virtue of these presents, or by judicial authority, the said trustee or trustees may bid for and purchase, or cause to be purchased, the property so sold, or any part of it, in behalf of the holders of said bonds secured by this deed, then outstanding, at a reasonable price, if only a part be sold; but if the whole property be sold, at a price not excee ling the whole amount of said bonds and interest then outstanding.

8th. If default be made by the party of the first part in the payment of any half year's interest on any of said bonds, and the warrant or coupon for such interest shall have been presented, and its payment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all of the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interest of all such bonds outstanding by foreclosure and sale of said property, or otherwise, as herein provided.

9th. It is hereby mutually agreed by the parties hereto, that the trustees shall be responsible only for gross negligence and willful default, and that they shall not be bound to do any act touching the execution of the trust, except at their own option, which may involve them in personal expense or liability, unless first duly and satisfactorily indemnified against the same by one or more of said bondholders.

In case of the death, resignation, or inability to act of any trustee, the board of directors may appoint a successor, and failing to so appoint, any court of competent jurisdiction may appoint a trustee to fill such vacancy on the application of the holders of the one-sixth part of the bonds hereby intended to be secured then outstanding, and such appointment by the board or by such court shall invest the trustee so appointed with all the interest, estate, power, and authority in the premises, and subject him or them to the same obligations hereby given and granted to the party of the second part herein.

And the said party of the first part hereby further covenants and agrees with the party of the second part, and their successors, and with the holders of each and all of the said issue of two millions and five hundred thousand dollars of bonds which may be issued, that the said party of the first part will create and make a sinking fund for the redemption of such bonds, and each of them, by setting aside and depositing with a sinking-fund commissioner or commissioners, to be appointed by the party of the first part for that purpose, from and after the first day of April, in the year 1873, and annually thereafter, until the maturity of said bonds, from the net earnings of the said road and property, after the payment of all the interest on said bonds, an amount of money equal to the one-half of one per cent. of the principal amount of all such bonds hereby secured, which shall then be outstanding. Such sinking fund-money shall, from time to time, under the orders of the party of the first part, be invested in the purchase of the bonds so issued, or in bonds of the Government of the United States or of the State of Illinois; and the money accruing on any and all of such investments for interest, as fast as the same shall be received, shall be added to and paid into the sinking fund, and compounded therein continually, and reinvested, in like manner, with the other money of said fund, and the same shall be used solely to redeem and eventually pay off said bonds herein and hereby secured.

That the board of directors of said railway company, party of the first part, shall have entire control over the management of said sinking fund, and every person in charge of, or connected with the same, and shall, from time to time, direct in what bonds or securities it shall be invested, and at what prices or rates, and how it shall be kept, and the manner of keeping the accounts thereof; and shall require ample

security to be given to them by any person in charge of its moneys, or its securities or bonds, for its safe keeping.

Every bond of the said issue which may be purchased and held by said sinking fund, shall remain in full force until the whole of such issue shall have matured or shall have been so absorbed, or otherwise redeemed, by said party of the first part, or until canceled, as hereinafter provided; and the interest on such bonds held by said sinking fund shall be paid by said railroad company regularly, as the interest on its other similar bonds is paid; and such bonds so in the sinking fund shall, as to the annual amount of money to be paid from net earnings into said fund, be regarded as outstanding.

At the annual meeting of the stockholders, in the year 1874, and at each annual meeting thereafter, all bonds of said issue, and the coupons thereon then being in the sinking fund, purchased by said fund as aforesaid, shall be withdrawn from said fund, and canceled, and so certified by the commissioner and treasurer of the company, and the signatures thereto mutilated; and in place thereof, the treasurer of the company shall give to the commissioner a receipt therefor, specifying the same, and such cancellation, which receipt shall be filed in the office
31 of said fund, and shall, semi-annually, draw and entitle said sinking fund to the same amount of interest as the bonds so canceled would have done, and for the same purpose.

It is understood and agreed by and between the parties hereto that no individual liability shall attach to any stockholders of the party of first part in behalf of the holders of any of the bonds secured by this mortgage or deed of trust, and that the holders of said bonds rely solely on the property, rights, and franchises of the party of the first part covered by this mortgage, and the stipulations and covenants of the said party of the first part herein contained, for the payment of the principal and interest of the bonds so held by them.

In witness whereof the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, has caused these presents to be executed, and signed by the president of their company and attested by their secretary, in their behalf and for the said company, and has caused the corporate seal of the company to be hereto affixed, the day and year first above written. And the parties of the second part have hereunto set their hands and affixed their seals the same day and year aforesaid.

CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*
[SEAL.] F. E. JONES, *Secretary.*

Executed in the presence of—
GEORGE P. ANDREWS.
JOHN GARDNER.
WM R. FOSDICK, [SEAL.]
JAMES D. FISH, [SEAL.]
Trustees.

STATE OF NEW YORK,
City and County of New York, ss:

Before me, the undersigned, a notary public of the State of New York, in the city of New York, duly commissioned and qualified, personally came this day William D. Judson, known to me to be the president of the Chicago, Danville and Vincennes Railroad Company, the party of

the first part in the above deed of trust, and who executed the same on behalf of said company, and acknowledged that the said railroad company, and he, as the president of said company and in its behalf, did sign, seal, and deliver the said indenture and deed of trust, as and for its own act and deed, and for the uses and purposes therein mentioned. Also personally appeared before me, at the same time, the above-named William R. Fosdick and James D. Fish, trustees, and the parties of the second part in the foregoing mortgage and deed of trust, and both personally known to me as the persons who signed the same as such, and each acknowledged that he did sign, seal, and execute the same for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this thirtieth day of March, anno Domini 1869.

[NOTARIAL SEAL.] GEORGE P. ANDREWS.
Notary Public, New York City and County.

32 EXHIBIT C.

Articles of consolidation between the Chicago, Danville and Vincennes Railroad Company and the Rossville and Indiana Railroad Company.

Articles of consolidation made, agreed upon, and concluded this fourth day of March, A. D. 1872, between the Chicago, Danville and Vincennes Railroad Company and the Rossville and Indiana Railroad Company, corporations duly incorporated and instituted as such by virtue of the laws of the State of Illinois.

Whereas the roads of the said companies intersect each other in the town of Ross, in the county of Vermillion, at a point on the said Chicago, Danville and Vincennes Railroad distant about six miles southeasterly from the village of Rossville, in said county, and form a continuous line from said point of intersection to the boundary line of the State of Indiana;

And whereas said companies, under their respective charters and the laws of the State of Illinois, are authorized to consolidate their stock and property with each other:

Now, therefore, it is hereby mutually agreed:

First. That from and after the date hereof the stock and property of the said Rossville and Indiana Railroad Company be, and the same is hereby, consolidated with the stock and property of the said Chicago, Danville and Vincennes Railroad Company, and that henceforth the said companies shall constitute but one corporation in the law.

Second. It is mutually agreed that the name of the said consolidated company shall be the Chicago, Danville and Vincennes Railroad Company, by which name it shall act and be described and known, and shall be clothed with all the franchises, power, and privileges conferred upon it by the original charters of said consolidating companies by the acts of the legislature of the State of Illinois authorizing consolidations in this and like cases, and by other laws of the State of Illinois relating to or affecting it.

Third. It is further mutually agreed that the stock in the respective companies shall be deemed and taken to be of equal value; and for every share in the Chicago, Danville and Vincennes Railroad Company, the said consolidated company shall issue to the holders thereof one share in the new or consolidated company, and for every share in the Rossville and Indiana Railroad Company the said consolidated company shall, in like manner, issue to the holder thereof one share of stock in the new company.

Fourth. As a consequence of said consolidation, it is hereby mutually understood and agreed that the consolidated company becomes liable for and assumes all the contracts and liabilities, and is to fulfill, perfect, and discharge all the duties and obligations of each of the consolidated companies.

33 In witness whereof the parties hereto have caused these presents to be subscribed by their respective presidents and secretaries, and their respective seals to be hereto affixed, the day and year first above written.

CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

[CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY, SEAL.]
J. S. CAMPBELL, *Secretary.*

ROSSVILLE & INDIANA RAILROAD COMPANY,
By J. E. YOUNG, *President.*

[ROSSVILLE & INDIANA RAILROAD COMPANY SEAL.]
E. H. JACQUELIN, *Secretary.*

Approved.

A. B. MEEKER,
J. E. YOUNG,
J. S. CAMPBELL,
C. B. MANSFIELD,
C. GREENWOOD,
Directors of the Rossville & Indiana Railroad Company.

Approved.

W. D. JUDSON,
WILLIAM YOUNG,
JA'S W. ELWELL,
MATT. TAYLOR,
JOHN TENNEY,
JAMES D. FISH,
A. GILBERT,
AMOS TENNEY,
N. F. MERRILL,
Directors of the Chicago, Danville & Vincennes Railroad Company.

The consolidation of the property and stock of the two contracting parties named in the foregoing articles of consolidation, in the manner and upon the terms therein contained, has been made and concluded with our consent and by our directions, and we hereby fully approve of and adopt the action of the directors and of the presidents and secretaries of the consolidating companies in executing the said articles and in completing such consolidation.

In witness whereof we, the stockholders in the said respective companies, have hereunto set our hands and seals this fourth day of March, A. D. 1872.

STOCKHOLDERS OF THE ROSSVILLE & INDIANA RAILROAD COMPANY.

J. S. Campbell	5	shares.
A. B. Meeker	5	"
J. H. Wrenn	5	"
W. L. Brown	5	"
Will. G. Stephens	5	"
C. B. Mansfield	1	"
E. H. Jacquelin	1	"
N. W. Jones	1	"

34	C. Greenwood	1 shares.
	M. W. Smith	5 "
	J. F. Torrence	5 "
	E. Walker	1 "
	W. D. Judson	95 "
	J. E. Young	200 "
	Amos Tenney	100 "
	F. E. Jones	1 "
	J. W. Wood	1 "
	E. E. Lawrence	1 "
	J. A. Flowers	1 "
	A. N. Hart	1 "
	W. B. Ullman	5 "

STOCKHOLDERS OF THE CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY.

	William Young	1,740 shares
	F. L. Simons	960 "
	N. F. Merrill	2,000 "
	H. D. Osborn	1,000 "
	Joseph E. Young	5,700 "
	W. D. Judson	2,205 "
	A. Gilbert	5 "
	Ja's W. Elwell	5 "
	James D. Fish	5 "
	Matt. Taylor	5 "
	John Tenney	684 "
	Amos Tenney	2,321 "
	Edward G. Judson	500 "

I, J. S. Campbell, secretary of the Chicago, Danville and Vincennes Railroad Company, do hereby certify that the foregoing articles of consolidation have been signed by all the directors of said company, and that the same have been satisfied, approved, and confirmed by the written consent of all the stockholders of said company.

Dated March 4th, 1872.

J. S. CAMPBELL,

Secretary of the Chicago, Danville & Vincennes Railroad Company.

[CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY SEAL.]

I, E. A. Jacquelin, secretary of the Rossville and Indiana Railroad Company, do hereby certify that the foregoing articles of consolidation have been signed by all the directors of said company, and that
35 the same have been satisfied, approved, and confirmed by the written consent of all the stockholders of said company.

Dated March 4th, 1872.

E. H. JACQUELIN,

Secretary of the Rossville & Indiana Railroad Company.

[ROSSVILLE & INDIANA RAILROAD COMPANY SEAL.]

Filed in the office of the secretary of state of Illinois, at Springfield, Illinois, March 14th, 1872.

Certified copy among company's papers.

NOTE.—The original C., D. & V. R. R. Co. was incorporated by special act of the Illinois legislature, approved February 16th, 1865.

The Rossville & Indiana Railroad Company was organized under the

general laws of Illinois. The articles of association were filed in the office of the secretary of state, at Springfield, February 23d, 1872.

The above consolidation formed C., D. & V. R. R. Co., No. 2.

EXHIBIT D.

Articles of consolidation between the Chicago, Danville & Vincennes Railroad Company and the Western Indiana Railroad Company.

Articles of consolidation made, agreed upon, and concluded this ninth day of March, A. D. 1872, between the Chicago, Danville and Vincennes Railroad Company, a corporation duly incorporated and constituted as such by virtue of the laws of the State of Illinois, and the Western Indiana Railroad Company, a corporation duly organized and existing under the laws of the State of Indiana.

Whereas, the said corporations have a common terminus on the line dividing the States of Illinois and Indiana, which has been fixed by said companies by and under their charters, at a point located on the State line, and between the town of Ross, in Vermillion County, Illinois, and the town of Marshfield, in Warren County, Indiana, and distant about ten miles southeasterly from the village of Rossville, in Vermillion County, aforesaid:

And whereas the roads of said companies, as now located, form a continuous line from the city of Chicago, in the State of Illinois, through said point on the State line to Brazil, in Clay County, in the State of Indiana, and are, therefore, under their respective charters, and the laws of the said States of Illinois and Indiana, authorized to consolidate their stock and property with each other:

Now, therefore, it is mutually agreed:

First. That from and after the date hereof, the stock and property of the said Chicago, Danville & Vincennes Railroad Company be, and the same is, hereby consolidated with the stock and property of
36 the said Western Indiana Railroad Company, and that henceforth the said companies shall constitute but one corporation in the law.

Second. It is mutually agreed that the name of the said consolidated company shall be the Chicago, Danville and Vincennes Railroad Company, by which name it shall act and be described and known, and shall be clothed with all the franchises, powers, and privileges conferred upon it by the original charter of said consolidating companies by the acts of the legislatures of the said States of Illinois and Indiana, authorizing consolidations in this and like cases, and by other laws of the States of Illinois and Indiana relating to or affecting it.

Third. It is further mutually agreed that the stock of the respective companies shall be deemed and taken to be of equal value; and for every share in the Chicago, Danville & Vincennes Railroad Company the said consolidated company shall issue to the holders thereof one share in the new or consolidated company; and for every share in the Western Indiana Railroad Company the consolidated company shall in like manner issue to the holder thereof one share of stock in the new company.

Fourth. As a consequence of said consolidation, it is hereby mutually understood and agreed that the consolidated company becomes liable for and assumes all the contracts and liabilities, and it is to fulfill, perfect, and discharge all the duties and obligations of each of the consolidated companies.

In witness whereof the parties hereto have caused these presents to be subscribed by their respective presidents and secretaries, and their respective seals to be hereto affixed, the day and year first above written.

[CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY SEAL.]

CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

J. S. CAMPBELL, *Secretary.*

[WESTERN INDIANA RAILROAD COMPANY SEAL.]

WESTERN INDIANA RAILROAD COMPANY,
By E. WALKER, *President.*

N. W. JONES, *Secretary.*

Approved.

W. D. JUDSON,
WILLIAM YOUNG,
JAS. W. ELWELL,
MATT. TAYLOR,
JOHN TENNEY,
JAMES D. FISH,
A. GILBERT,
AMOS TENNEY,
N. T. MERRILL,

Directors of the Chicago, Danville & Vincennes Railroad Company.

Approved.

E. WALKER,
J. E. YOUNG,
C. B. MANSFIELD,
J. S. CAMPBELL,
C. GREENWOOD,

Directors of the Western Indiana Railroad Company.

37 The consolidation of the property and stock of the two contracting parties named in the foregoing articles of consolidation, in the manner and upon the terms therein contained, has been made and concluded with our consent, and by our directions, and we hereby fully approve of and adopt the action of the directors and of the presidents and secretaries of the consolidating companies in executing the said articles, and in completing such consolidation.

In witness whereof we, the stockholders in the said respective companies, have hereunto set our hands and seals, this ninth day of March, A. D. 1873.

STOCKHOLDERS OF THE WESTERN INDIANA RAILROAD COMPANY.

J. S. Campbell	5	shares.
E. Greenwood	5	"
C. B. Mansfield	5	"
E. H. Jacquelin	5	"
W. D. Judson	20	"
A. B. Meeker	5	"
J. H. Wrenn	5	"
Will. G. Stephens	5	"
E. D. C. Overman	5	"
R. M. Clinnie	5	"

E. Walker	5	shares.
R. Biddle Roberts	5	"
J. E. Young	400	"
Amos Tenney	20	"

STOCKHOLDERS OF THE CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY.

J. H. Wrenn	5	shares.
W. G. Stephens	5	"
M. W. Smith	5	"
W. L. Brown	5	"
E. Walker	1	share.
F. E. Jones	1	"
J. W. Wood	1	"
E. E. Lawrence	1	"
J. A. Flowers	1	"
C. B. Mansfield	1	"
E. H. Jacquelin	1	"
N. W. Jones	1	"
A. B. Meeker	5	shares.
J. T. Torrence	5	"
38 C. Greenwood	1	share.
W'm Young	1,740	shares.
F. L. Simons	960	"
N. F. Merrill	2,000	"
A. N. Hart	1	share.
W. S. Osborne	1,000	shares.
Joseph E. Young	5,700	"
W. D. Judson	2,205	"
A. Gilbert	5	"
W. B. Ullmann	5	"
Ja's W. Elwell	5	"
James D. Fish	5	"
Matt. Taylor	5	"
John Tenney	684	"
Amos Tenney	2,321	"
Edward G. Judson	500	"

I, J. S. Campbell, secretary of the Chicago, Danville and Vincennes Railroad Company, do hereby certify that the foregoing articles of consolidation have been signed by the president and all the directors of said company; that the same have been ratified, approved, and confirmed by the within written consent of all the stockholders of said company.

Dated March 9th, 1872.

J. S. CAMPBELL,
Secretary of the Chicago, Danville and Vincennes Railroad Company.

(CHICAGO, DANVILLE AND VINCENNES)
(RAILROAD COMPANY SEAL.)

I, N. W. Jones, secretary of the Western Indiana Railroad Company, do hereby certify that the foregoing articles of consolidation have been signed by the president and all the directors of said company, and that

the same has been ratified, approved, and confirmed by the written consent of all the stockholders of said company.

Dated March 9th, A. D. 1872.

N. W. JONES,
Secretary of the Western Indiana Railroad Company.

{ WESTERN INDIANA RAILROAD }
{ COMPANY SEAL. }

Filed in office secretary of state of Indiana, Indianapolis, March 14th, 1872.

Filed in office secretary of state of Illinois, Springfield, March , 1872.

Certified copies among company's papers.

NOTE.—The Western Indiana Railroad Company was organized under the general laws of Indiana.

39 The articles of association were filed in the office of the secretary of state, at Indianapolis, March 8th, 1872.

The above consolidation formed C. D. & V. R. R. Co. No. 3.

EXHIBIT E.

Articles of consolidation between the Chicago, Danville and Vincennes Railroad Company and the Attica and Terre Haute Railroad Company.

Articles of consolidation, made and agreed upon, and concluded this sixth day of May, A. D. 1872, between the Chicago, Danville and Vincennes Railroad Company, a corporation, duly incorporated, and constituted as such, by virtue of the laws of the States of Illinois and Indiana, and the Attica and Terre Haute Railroad Company, a corporation duly organized and existing under the laws of the State of Indiana.

Whereas the roads of said companies, as now located, intersect, join, and unite with each other by continuous lines, and they are, therefore, under their respective charters, and the laws of the States of Illinois and Indiana, authorized to consolidate their stock and property with each other;

And whereas, by a resolution of the board of directors of the Chicago, Danville and Vincennes Railroad Company, adopted at a meeting of said board held on the 11th day of April, 1872, and by a like resolution of the board of directors of the Attica and Terre Haute Railroad Company, adopted at a meeting of said board held on the first day of April, 1872, the terms and provisions embraced in this contract were submitted and recommended to the stockholders of their respective companies, as terms suitable and proper upon which to consolidate the stock and property of the said two companies with each other, which terms and provisions have been adopted by the consent and vote of the majority of the stockholders of the respective companies at meetings thereof duly called and held, and at which meetings a majority of the stock of the said respective companies was represented;

And whereas, by resolutions of the boards of directors of the respective companies, and by the vote of the stockholders of said companies, respectively, the presidents and secretaries of the said respective companies have been authorized and directed to cause to be prepared, and in behalf of, and under the seals of, their respective companies, to execute articles of consolidation, upon the terms herein contained;

Now, therefore, it is mutually agreed:

First. That from and after the date hereof, the stock and property of the said Chicago, Danville and Vincennes Railroad Company be, and the same is hereby, consolidated with the stock and property of the said Attica and Terre Haute Railroad Company, and that henceforth the said companies shall constitute but one corporation in the law.

Second. It is also mutually agreed, that the name of the consolidated company shall be the Chicago, Danville and Vincennes Railroad Company, by which name it shall act and be described and known, and shall be clothed with all the franchises, powers, and privileges conferred upon it by the original charters of said consolidating companies by the acts of the legislatures of the said States of Illinois and Indiana authorizing consolidations in this and like cases, and by the laws of the States of Illinois and Indiana relating to or affecting it.

Third. It is further mutually agreed, that the stock in the respective companies shall be deemed and taken to be of equal value, and for every share in the Chicago, Danville and Vincennes Railroad Company, the said consolidated company shall issue to the holders thereof, one share in the new or consolidated company; and for every share in the Attica and Terre Haute Railroad Company, the consolidated company shall in like manner issue to the holders thereof, one share of stock in the new company, provided, however, that all such stock shall be subject to the payments of such installments thereupon as may be unpaid at the time of this consolidation.

Fourth. There shall be nine directors to manage the affairs of the company, and their names are: James W. Elwell, James D. Fish, William D. Judson, Amos Tenney, Mathew Taylor, N. F. Merrill, John Tenney George Nebeker, and Alvin Gilbert, who shall hold and discharge the duties of such office until a new board shall be elected.

Fifth. As a consequence of said consolidation, it is hereby mutually understood and agreed that the consolidated company, or the new Chicago, Danville and Vincennes Railroad Company, becomes liable for, and assumes all the contracts and liabilities, and is to fulfill, perfect, and discharge all the duties and obligations of each of the consolidated companies.

In witness whereof the parties hereto have caused these presents to be subscribed by their respective presidents and secretaries, and their respective seals to be hereto affixed, the day and year first above written.

[SEAL.] CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

J. S. CAMPBELL, *Secretary.*

[SEAL.] ATTICA AND TERRE HAUTE RAILROAD COMPANY,
By GEO. NEBEKER, *President.*

H. A. FREY, *Secretary.*

I, J. S. Campbell, secretary of the Chicago, Danville and Vincennes Railroad Company, do hereby certify that the foregoing articles of consolidation have been ratified, approved, and confirmed, by a vote of a majority of the stockholders of said company, at a special meeting of said stockholders, held at the office of said company, in the city of Chicago, Illinois, on the 30th day of April, 1872.

In witness whereof I have hereunto set my hand and affixed the seal of the said company, at Chicago, Illinois, this sixth day of May, A. D. 1872.

[SEAL.] J. S. CAMPBELL, *Secretary.*

I, H. A. Frey, secretary of the Attica and Terre Haute Railroad Company, do hereby certify that the foregoing articles of consolidation have been ratified, approved, and confirmed by a vote of a majority of the stockholders of said company, at a special meeting of said stockholders, held at the office of said company, at Covington, Indiana, on the 13th day of April, A. D. 1872.

In witness whereof I have hereunto set my hand and affixed the seal of the said company, at Covington, Indiana, this sixth day of May, A. D. 1872.

[SEAL.] H. A. FREY, *Secretary.*

We, the undersigned, do hereby certify that the within and foregoing is a true copy of the articles of consolidation of the Chicago, Danville and Vincennes Railroad Company, and of the Attica and Terre Haute Railroad Company, and of the whole of said articles.

Witness our hands and the seals of said companies, this sixth day of May, A. D. 1872.

[SEAL.] W. D. JUDSON,
President of the Chicago, Danville and Vincennes Railroad Company.

[SEAL.] GEORGE NEBEKER,
President of the Attica and Terre Haute Railroad Company.

Certificates.

STATE OF INDIANA,
Office of Secretary of State.

I, John H. Farquhar, secretary of state of the State of Indiana, do hereby certify that I have compared the within and foregoing with the articles of consolidation between the Chicago, Danville and Vincennes Railroad Company, and the Attica and Terre Haute Railroad Company, filed in the office of secretary of state of the State aforesaid, on the 11th day of May, A. D. 1872, as appeared from date of filing, endorsed thereon, and that it is a full, true, and complete transcript therefrom, and of the whole of said articles of consolidation.

In witness whereof I have hereunto set my hand and affixed the seal of the State, at the city of Indianapolis, this 13th day of May, A. D. 1872.

[SEAL.] JOHN H. FARQUHAR,
Secretary of State,
By I. M. EDDY, *Deputy.*

42 Filed in the office of the secretary of state of Illinois, at Springfield, May 10th, 1872.

NOTE.—The Attica and Terre Haute R. R. Co. was organized under the general laws of Indiana. Do not know date of filing of articles of association.

The above consolidation formed C. D. & V. R. R. Co. No. 4, which is the present company.

W. D. J.

November 30th, 1874.

EXHIBIT F.

Form of mortgage.

This indenture, made this twelfth day of March, in the year one thou-

sand eight hundred and seventy-two, between the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, party of the first part, and William R. Fosdick and James D. Fish, of the city and State of New York, trustees, upon certain trusts hereinafter specified and provided, the party of the second part:

Whereas the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, under and in pursuance of the provisions of the acts incorporating the same, has commenced to construct and put in operation that division of its railroad situate, lying, and being in the State of Indiana, commencing on the boundary line between said States of Illinois and Indiana, in the township of Marshfield and county of Warren, in the State of Indiana, at the point where it connects with the road of said party of the first part, terminating on the eastern boundary-line of the State of Illinois, in the town of Ross, in Vermillion County, in said last-named State, and distant about ten miles southeasterly from the village of Rossville, extending thence in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also, a branch road, extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg, in said county, and is now engaged in constructing the same;

And for the purpose aforesaid, needs and has resolved to purchase and transport iron rails, chairs, spikes, and other iron and materials necessary therefor, and engines, cars, and other rolling-stock and machinery to be used thereon, and to borrow a portion of the money necessary to make such purchases and to pay for such transportation, and the construction, completion, and equipment of said road;

And whereas at a meeting of the board of directors of the said
43 Chicago, Danville and Vincennes Railroad Company, the party of the first part, held pursuant to law, on the eleventh day of March, in the year 1872, the said board of directors resolved and enacted an order and resolutions as follows, to wit:

"Resolved, That, to aid in providing the means required for the construction and equipment of that division of this company's road situate, lying, and being in the State of Indiana, an issue of bonds shall be made by the company, amounting to one million and five hundred thousand dollars, each bond to be for the sum of $1,000, and to bear seven per cent. per annum interest, payable semi-annually, on the first days of April and October in each year, and the principal to be payable on the first day of April, 1912, and both principal and interest to be payable in United States gold coin, in the city of New York; and each bond to contain an express waiver of all recourse by the holder of the same to any individual liability of the stockholders of this company.

"That said bonds shall be dated as made on the twelfth day of March, A. D. 1872.

"In case default be made in the payment of any half year's interest on any of said bonds, and the warrant for said interest shall have been presented and its payment demanded, and such default shall have continued for six months after such demand, without the consent of the holder of said coupon or bond, then and thereupon the principal of all such bonds shall become immediately due and payable. That a warrant for each semi-annual payment of interest shall be made and authenti-

cated for and on behalf of this company by the secretary of this company and annexed to each bond. That said bonds shall be prepared by the president of the company, and signed by him for and on behalf of this company and attested by the treasurer, and shall have annexed to them a certificate of authentication of the trustee or trustees under the mortgage made to secure them, and shall not be issued or obligatory without such certificate.

"That from and after the first day of April, A. D. 1876, and until the maturity of said bonds, there shall be annually created, paid, and deposited with a sinking-fund commissioner or commissioners, to be appointed by the board of directors, and to hold office at the pleasure of the board, a sinking-fund, to aid in the final redemption of said bonds, of an amount of money derived from the net earnings of said road and property, equal to one-half of one per cent. on the whole amount of said issue of bonds at the time of any such payment outstanding. Said fund, and all investments and accounts thereof, and its management, shall always be under the control of this board, and shall be from time to time continually invested by the commissioner or commissioners in the purchase of said bonds or bonds of the Government of the United States or of the States of Illinois and Indiana; and the interest on all such investments, as collected, shall be added to and continually compounded with
44 said fund, and the same shall be used and appropriated solely to redeem and eventually pay off said issue of bonds hereby provided to be made.

"No bond of said issue purchased by said fund shall thereby be canceled, but shall, with its coupons, be stamped as owned by said sinking-fund, and it, or its amount if destroyed, shall remain a liability against the company, and the interest shall be paid to the said sinking-fund the same as paid on other bonds, and shall be added to said fund, until the whole of said issue of bonds shall have been absorbed or otherwise paid off, when the whole issue shall be canceled. Any bonds of said issue which may be in said sinking-fund at any time may be destroyed by order of the board of directors of said company; but in such case the semi-annually accruing interest on the amount so destroyed must thereafter be paid to said sinking-fund. The bonds and securities belonging to the sinking-fund shall be kept in the office of the sinking-fund commissioner or commissioners, which shall be at or near the principal office of said railroad company.

"That for the purpose of securing the final payment of said issue of $1,500,000 of bonds, with all interest to accrue thereon, this company will make and deliver to William R. Fosdick and James D. Fish, as trustees, a mortgage and deed of trust, conveying to said persons as trustees, for the benefit of every holder of such bonds, or any of them, all that division of the road of this company situate, lying, and being in the State of Indiana, commencing on the boundary-line between the States of Illinois and Indiana, and in the township of Marshfield, and county of Warren, in the State of Indiana, at the point where it connects with the road of this company, terminating on the eastern boundary-line of the State of Illinois, in the town of Ross, in Vermil'ion County, in said last-named State, and distant about ten miles southeasterly from the village of Rossville; extending thence in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Park County; and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also, a branch road, extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington,

in Fountain County, and extending in an easterly direction to the village of Newburg, in said county, the entire length of road being about eighty miles; and also all such additional branch roads as this company may hereafter construct for the purpose of extending its tracks into the coal and mining regions in the vicinity of its said main lines of road, with all the property, rights, and franchises of this company of every kind and description whatever, pertinent to said road between said terminal points, and all the income to be had and derived from operating the same, in trust, to secure the final payment of said bonds as aforesaid, with all the rights, covenants, powers, and authority, in case default be made by this company in such payments as in said deed of trust
45 shall be specified, to foreclose said mortgage, and to sell the property so mortgaged, or to take possession of and operate the same, and receive the incomes thereof; but not in any case, before any default, to disturb or interfere with this company in the possession, control, and management thereof, or from receiving the incomes thereof, or from selling or exchanging any of the personal property, or machinery, or equipments thereof, or any of the lands or real estate, not necessary for the use and operation of the railroad; as to all of which, as will be in said mortgage and deed of trust specifically stated, agreed upon, and set forth.

"That the president of this company is hereby authorized and fully empowered to make and sign, and execute, and seal with the corporate seal of this company, the said mortgage and deed of trust, and to acknowledge the same for and on behalf of this company for record; and on the acceptance of said trust, and signing the said deed by the said trustees, to cause the same to be recorded according to law, and thereupon to make, sign, execute, and prepare said $1,500,000 of bonds for issue and sale, as shall be hereafter ordered by this board."

And whereas the said Chicago, Danville and Vincennes Railroad Company, party of the first part, hath, in accordance with the provisions of said order and resolution, made and executed bonds to the amount of one million and five hundred thousand dollars, of the form, denomination, and character prescribed by said order and resolution, and hold the same to be authenticated, issued, used, and disposed of for the purposes in said order and resolution stated:

Now, therefore, in further pursuance of said order and resolution, and to the end and purpose of securing and assuring the punctual payment of said one million and five hundred thousand dollars of bonds, and every part thereof which may be issued, to the persons who may become the holders of the same, or any of them:

This indenture witnesseth that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the said party of the second part, trustees as aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, doth hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the said William R. Fosdick and James D. Fish, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire railroad of the party of the first part, situate, lying, and being in the State of Indiana, commencing on the boundary-line between the States of Illinois and Indiana, in the township of Marshfield, and county of Warren, in the State of Indiana, at the point where it connects with the road of the party of the
first part, terminating on the eastern boundary-line of the State of
46 Illinois, in the town of Ross, in Vermilion County, in said last-

named State, and distant about ten miles southeasterly from the village of Rossville, extending thence in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County, and thence southeasterly, to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also, a branch road, extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburgh, in said county, the entire length of road being about eighty miles; and also all such additional branch roads as said party of the first part may hereafter construct, for the purpose of extending its tracks into the coal and mining regions in the vicinity of said main lines of road; with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has, or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever, pertinent thereto.

Provided, however, that this grant and conveyance aforesaid shall not include nor operate to transfer any lands, goods, chattels, property, machinery, equipment, or other matters, which said company now owns, or may hereafter acquire, that need not be used for any purpose incident to the management or operation of said railway, or the repair thereof, or in the business of said railway company; nor any franchises, power, or corporate right to build that portion of the line of railroad which, by its charter, it is authorized to locate and construct, and not embraced within the terminal points hereinbefore described; but all which last mentioned franchises and right of way shall be wholly excepted and exempt from these presents and the grant and conveyance herein specified; nor shall these presents, in any way, prohibit the party of the first part from selling and conveying or otherwise disposing of the same, and all the proceeds thereof; nor from receiving, using, and applying any money or personal property of said company to the repairs of said road or its appurtenances, or to its current expenses, or to the purchase of necessary machinery, or the renewal thereof; and the board of directors of said company may likewise distribute and pay any net annual incomes and profits to stockholders, after paying the interest on the said bonds, and providing for any sinking fund required to be created and kept: To have and to hold the said railway property, premises, interests, rights, and appurtenances mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance, unto the said
47 party of the second part, as such trustees as aforesaid, and to their successors in said trust, or assigns, to and for the only use, benefit, and behoof of the said trustees, and their cestui que trust, their successors and assigns, forever; but in special trust and confidence, and upon the conditions following, that is to say:

1st. That this conveyance is for, and shall be by the said party of the second part, their successors and assigns, held, used, and owned solely for the benefit and protection and security of the persons and corporations who shall hold and own the bonds about to be issued as aforesaid, by the party of the first part, and for enforcing the stipulations of said company as to said issue of bonds, and the disposal thereof, and secur

ing the same, and the final payment thereof, in their true intent and meaning, whether contained in said bonds, or the interest warrants attached to them, or in this deed.

2d. That for the better assuring and confirming the title and powers of the said party of the second part, their successors and assigns, in the said premises and property hereby conveyed, and in and to any premises and property or rights hereafter accruing, or to be acquired by said party of the first part, appurtenant to said railroad, which is intended to pass or be passed by this conveyance, the said party of the first part, their successors and assigns, will and shall, as often as may be lawfully required by the party of the second part, or their successors or assigns, holding the above-granted trust, do such acts, and make such other and further conveyances and assurances in law as such party of the second part shall, by counsel learned in the law, be advised are necessary for the better carrying out of the object of the parties to this mortgage or deed of trust.

3d. That if the said party of the first part, their successors or assigns, shall well and truly pay to the holders of said one million and five hundred thousand dollars of bonds, so to be issued and hereby secured, the respective sums of money and interest due and accruing on said bonds on the days and times therein mentioned, and according to the tenor and effect of said bonds, then and thenceforth this indenture, and all the estate hereby granted, shall become and be utterly void and of no further effect; and the same shall be, by such payment, wholly annulled and satisfied, without any further receipt or entry of satisfaction of record whatever, but shall be, if required, entered and certified on any record of the same as so satisfied by the party of the second part or their successors.

4th. That until default shall have been made by the party of the first part in the payment of principal or interest of the said bonds or some of them, or until default shall have been made in respect to something herein required to be done by the said party of the first part, the said party of the first part shall be suffered and permitted to possess, use, occupy, manage, and operate the said railroad, property and franchises and appurtenances, and to renew, replace, and repair the same, and
48 every part thereof, and take and receive and use the tolls, rents, issues, incomes, and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

5th. In case default shall be made in the payment of any interest on any of the aforesaid bonds issued or to be issued, according to the tenor of the coupons thereto annexed, or of the provisions hereof; or in case default shall be made in the payment of the principal of said bonds, or any of them, when the same shall become due, without the consent of the holder of such bond on which such default shall occur, the said party of the first part hereby covenants and agrees to and with the party of the second part, and their successors and assigns, that within six months after such default shall have occurred, the same default still continuing, the said party of the first part, on demand of the said trustee or trustees for the time being, shall and will surrender to him or them, or to their agent, the actual possession of the herein granted and demised railroad and premises, together with all the books, records, papers, accounts, and money of said company, and all management and control thereof; and that all the expenses of taking, holding, managing, and operating said property, if possession be so taken, shall be paid from the income and profits thereof; and if said property shall, after such taking possession thereof, be sold, then from the sale thereof; or such

expenses may be paid from the sale of any personal property, as the said trustees may deem proper; and that said party of the second part, and their successors, having taking such possession, may manage, operate, and control said road and property and all of its affairs, and appoint all needful agents and employees for that purpose, and pay the same, and receive all the incomes, issues, and profits thereof, and apply the same to the payment of the said interest so in default, according to the true intent and tenor of the said bonds and the coupons annexed and to the terms of this deed, until such default shall have been satisfied, if such incomes and profits will satisfy the same—first paying all expenses of such possession and management, and all taxes, assessments, and charges on said property, and a just compensation for their own services as such trustees. But in any and all cases of such taking of possession by said party of the second part, and paying up any such default, and the expenses aforesaid, the said party of the second part shall immediately thereafter redeliver the said railway and premises, books, records, and money and accounts into the possession of the party of the first part; provided, that no such demand for such possession shall be made by said trustee or trustees until they shall have been required by the holders of at least the one-half of all of the said issue of bonds which shall then be unpaid and outstanding to make such demand, and to take such possession of said road and property.

6th. That in case default shall be made as aforesaid, and shall continue as aforesaid, it shall be lawful for the party of the second
49 part, or their successors in said trust, after entry as aforesaid, or other entry, or without entry, personally, or by agent or attorney, to sell and dispose of, to the highest bidder, all and singular the premises hereby conveyed, or intended so to be, as an entirety, at public auction, in the city of Indianapolis, State of Indiana, at such time as said party of the second part may appoint, first having demanded of the party of the first part full payment of all money then in default, and also first having given sixty days' notice of such time and place of sale, and a full description of the property so to be sold, by advertisement thereof in two newspapers; one published in Indianapolis, in the State of Indiana, and one published in the city of New York; and to adjourn said sale from time to time, in their discretion, and, if adjourned, to make such sale in manner aforesaid, without further notice, at the time and place to which it may be so adjourned; and upon such sale, and receiving the purchase money therefor, to convey the same, by good and sufficient conveyances, to the purchaser or purchasers; and such sale and conveyance so made shall convey all the right, title, estate, interest, and property of the said party of the first part, of, in, and to the said road, premises, franchises, and property to the said purchaser, in fee-simple, forever; and shall be a perpetual bar, both in law and equity, against the said party of the first part, and their successors and assigns, and against all and every person claiming or to claim the said premises, or any part thereof, under them, forever. After deducting from the proceeds of such sale the expenses of the sale and conveyance, and all advances or liabilities which may have been made or incurred by the party of the second part in operating and controlling and maintaining the said railroad and property, and in managing its business and affairs while in possession, and all payments for taxes, charges, and assessments on said premises, or any part thereof, as well as reasonable compensation for their own services, to apply the proceeds of such sale to the payment of the interest of said one million and five hundred thousand dollars of bonds, or so many of them as shall have been issued

by said party of the first part, and be then outstanding, pro rata, until all such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds, pro rata, until such principal shall be paid; and if any surplus remain after paying all of said matters, to pay such surplus to the party of the first part; and such payments shall be so made on said bonds, whether the same shall have become due or not at the time of such sale: Provided, That said trustee or trustees may, in their discretion, sell the said premises as an entirety, and in doing so shall make legal distribution of the proceeds of such sale accordingly.

It is hereby declared that the receipt of said trustee or trustees making any such sale to the purchaser of the premises for the purchase-money shall be a full and sufficient discharge of such purchaser therefor, and that said purchaser shall not, after payment of said purchase-money, and obtaining such receipt therefor, be liable, or in any way bound, to see said purchase-money applied to this trust, or otherwise, or in any manner answerable for its loss or misapplication, or obliged to inquire into the authority for making such sale.

7th. At any sale of the property aforesaid, or any part thereof, made by virtue of these presents, or by judicial authority, the said trustee or trustees may bid for and purchase, or cause to be purchased, the property so sold or any part of it, in behalf of the holders of said bonds secured by this deed then outstanding, at a reasonable price if only a part be sold; but if the whole property be sold, at a price not exceeding the whole amount of said bonds and interest then outstanding.

8th. If default be made by the party of the first part in the payment of any half-year's interest on any of said bonds and the warrant or coupon for such interest shall have been presented and its payment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all of the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and upon the written request of the holders of the majority of the said bonds then outstanding shall proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as herein provided.

9th. It is hereby mutually agreed by the parties hereto that the trustees shall be responsible only for gross negligence and willful default, and that they shall not be bound to do any act touching the execution of the trust, except at their own option, which may involve them in personal expense or liability, unless first duly and satisfactorily indemnified against the same by one or more of said bondholders.

In case of the death, resignation, or inability to act of any trustee, the board of directors may appoint a successor, and failing to so appoint, any court of competent jurisdiction may appoint a trustee to fill such vacancy on the application of the holders of the one sixth part of the bonds hereby intended to be secured then outstanding, and such appointment by the board or by such court shall invest the trustee so appointed with all the interest, estate, power, and authority in the premises, and subject him or them to the same obligations hereby given and granted to the party of the second part herein.

And the said party of the first part hereby further covenants and agrees with the party of the second part and their successors, and with the holders of each and all of the said issue of one million and five hun-

dred thousand dollars of bonds which may be issued, that the said party of the first part will create and make a sinking fund for the re-
51 demption of such bonds and each of them, by setting aside and depositing with a sinking-fund commissioner or commissioners, to be appointed by the party of the first part for that purpose, from and after the first day of April, in the year 1876, and annually thereafter until the maturity of said bonds, from the net earnings of the said road and property, after the payment of all the interest on said bonds, an amount of money equal to one-half of one per cent. of the principal amount of all such bonds hereby secured which shall then be outstanding. Such sinking-fund moneys shall from time to time, under the orders of the party of the first part, be invested in the purchase of the bonds so issued, or in bonds of the Government of the United States or of the States of Illinois and Indiana, and the money accruing on any and all of such investments for interest, as fast as the same shall be received, shall be added to and paid into the sinking fund, and compounded therein continually, and reinvested, in like manner with the other money of said fund, and the same shall be used solely to redeem and eventually pay off said bonds herein and hereby secured.

That the board of directors of said railway company, party of the first part, shall have entire control over the management of said sinking fund, and every person in charge of or connected with the same, and shall, from time to time, direct in what bonds or securities it shall be invested, and at what prices or rates, and how it shall be kept, and the manner of keeping the accounts thereof; and shall require ample security to be given to them by any person in charge of its moneys, or its securities or bonds, for its safe-keeping.

Every bond of the said issue which may be purchased and held by said sinking fund shall remain in full force until the whole of such issue shall have matured or shall have been so absorbed, or otherwise redeemed, by said party of the first part, or until canceled, as hereinafter provided; and the interest on such bonds held by said sinking fund shall be paid by said railroad company regularly, as the interest on its other similar bonds is paid; and such bonds so in the sinking fund shall, as to the annual amount of money to be paid from net earnings into said fund, be regarded as outstanding.

At the annual meeting of the stockholders, in the year 1877, and at each annual meeting thereafter, all bonds of said issue, and the coupons thereon then being in the sinking fund, purchased by said fund as aforesaid, shall be withdrawn from said fund, and canceled, and so certified by the commissioner and treasurer of the company, and the signatures thereto mutilated; and in place thereof the treasurer of the company shall give to the commissioner a receipt therefor, specifying the same, and such cancellation; which receipt shall be filed in the office of said fund, and shall, semi-annually, draw and entitle said sinking fund to the same amount of interest as the bonds so canceled would have done, and for the same purposes.

52 It is understood and agreed by and between the parties hereto that no individual liability shall attach to any stockholders of the party of the first part in behalf of the holders of any of the bonds secured by this mortgage or deed of trust, and that the holders of said bonds rely solely on the property, rights, and franchises of the party of the first part covered by this mortgage, and the stipulations and covenants of the said party of the first part herein contained, for the payment of the principal and interest of the bonds so held by them.

In witness whereof the said Chicago, Danville and Vincennes Rail-

road Company, the party of the first part, has caused these presents to be executed and signed by the president of their company, and attested by their secretary, in their behalf and for the said company, and has caused the corporate seal of the company to be hereto affixed, the day and year first above written. And the parties of the second part have hereunto set their hands and affixed their seals, the same day and year aforesaid.

CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

Executed in presence of—
RICH'D N. WHITLOCK,
H. A. GILDERSLEEVE.

[SEAL.] J. S. CAMPBELL, *Secretary.*

WM R. FOSDICK, [SEAL.]
JAMES D. FISH, [SEAL.]
Trustees.

STATE OF NEW YORK,
City and County of New York, ss:

Before me, the undersigned, a notary public of the State of New York, in the city of New York, duly commissioned and qualified, came this day, William D. Judson, to me personally known, and also known by me to be the president of the Chicago, Danville and Vincennes Railroad Company, the party of the first part in the above deed of trust, and who executed the same on behalf of said company, and acknowledged that the said railroad company, and he, as the president of said company, and in its behalf, did sign, seal, and deliver the said indenture and deed of trust, as and for its own act and deed, and for the uses and purposes therein mentioned. Also personally appeared before me, at the same time, the above named William R. Fosdick, one of the trustees, and one of the parties of the second part in the foregoing mortgage and deed of trust, and personally known to me as the person who signed the same as such, and acknowledged that he did sign, seal, and execute the same, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this thirteenth day of March, anno Domini 1872.

[SEAL.] H. A. GILDERSLEEVE,
Notary Public, New York City and County.

53 STATE OF ILLINOIS,
County of Cook, ss:

Before me, the undersigned, a notary public of the State of Illinois, in the county of Cook, in the city of Chicago, duly commissioned and qualified, came James D. Fish, to me personally known, and one of the trustees, and one of the parties of the second part in the foregoing mortgage and deed of trust, and personally known to me as the person who signed the same as such, and acknowlodgrd that he did sign, seal, and execute the same, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 15th day of March, anno Domini 1872.

[SEAL.] JOHN B. ADAMS,
Notary Public, in the City of Chicago and County of Cook.

54 EXHIBIT G.

Consolidated mortgage.

This indenture, made this twenty-fourth day of April, in the year one thousand eight hundred and seventy-two, between the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, party of the first part, and William R. Fosdick and James D. Fish, of the city and State of New York, trustees, upon certain trusts hereinafter specified and provided, the party of the second part.

Whereas the Chicago, Danville and Vincennes Railroad Company has heretofore issued, sold, and disposed of two thousand and five hundred of its first-mortgage bonds, of one thousand dollars each, numbered from one (1) to two thousand and five hundred (2,500), both inclusive, amounting in the aggregate to two millions and five hundred thousand dollars, which bonds are dated the tenth day of March, A. D. 1869, are due and payable on the first day of April, A. D. 1909, with semi-annual interest coupons attached thereto, payable on the first days of April and October in each year, until the maturity of said bonds, and both principal and interest payable in United States gold coin, and all of which bonds are now outstanding and unpaid;

And whereas said corporation, in order to secure the payment of the principal and interest of the said two millions and five hundred thousand dollars of bonds, did, under date of the tenth day of March, A. D. 1869, aforesaid, make and execute a certain mortgage or deed of trust to William R. Fosdick and James D. Fish, trustees, conveying to them, as said trustees, that division of the road of said corporation, situate, lying and being in the counties of Cook, Will, Kankakee, Iroquois, and Vermilion, in the State of Illinois, together with certain other property of said corporation, reference being had to the mortgage or deed of trust aforesaid, which is recorded in the several counties mentioned therein, for a more full description of the premises and property so conveyed, and embraced in said deed of trust, and for all other and further provisions contained therein;

And whereas the Chicago, Danville and Vincennes Railroad Company have made and executed certain other of its first-mortgage bonds, of one thousand dollars each, numbered from number two thousand five hundred and one (2,501) to four thousand (4,000), both inclusive, amounting in the aggregate to one million and five hundred thousand dollars, which bonds are dated on the 12th day of March, A. D. 1872, are due and payable on the first day of April, A. D. 1912, with semi-annual interest coupons attached thereto, payable on the first days of April and October in each year, until the maturity of said bonds,
55 and both principal and interest payable in United States gold coin, and which bonds said company are now about to sell and dispose of for the purpose of providing a portion of the means required for the construction and equipment of that division of its road situate in the State of Indiana;

And whereas said corporation, in order to secure the payment of the principal and interest of said last-mentioned one million and five hundred thousand dollars of bonds, did, under date of the twelfth day of March, A. D. 1872, aforesaid, make and execute a certain other mortgage or deed of trust to William R. Fosdick and James D. Fish, trustees, conveying to them, as said trustees, that division of the road of said corporation, situate, lying and being in the counties of Warren, Fountain, Parke, and Clay, in the State of Indiana, together with certain other

property of said corporation, reference being had to the mortgage or deed of trust aforesaid, which is recorded in the several counties mentioned therein, for a more full description of the premises and property so conveyed and embraced in said deed of trust, and for all other and further provisions contained therein:

Now, for the purpose of more fully securing and assuring the punctual payment of the said two millions and five hundred thousand dollars of bonds, before mentioned, numbered from number 1 to number 2,500, both inclusive, and dated the tenth day of March, A. D. 1869, and due and payable on the first day of April, A. D. 1909, and every part thereof, and the interest thereon, to the persons who may become the holders of the same, or any of them:

This indenture witnesseth that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the said party of the second part, trustees as aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, in addition to the conveyance made by it to said party of the second part, by the indenture aforesaid, dated March 10, A. D. 1869, doth hereby grant, bargain, sell, enfeoff, release, assign and convey unto the said William R. Fosdick and James D. Fish, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire division of the railroad of the party of the first part, situate, lying and being in the State of Indiana, commencing on the boundary-line between the States of Illinois and Indiana, in the township of Marshfield and county of Warren, in the State of Indiana, at the point where it connects with the road of the party of the first part, terminating on the eastern boundary-line of the State of Illinois, in the town of Ross, in Vermilion County, in said last-named State, and distant about ten miles southeasterly from the village of Rossville, extending thence in a southeasterly direction to Covington, in Fountain County; thence southerly, to Montezuma, in Parke County, and thence southeasterly, to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad. Also, a branch road extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to
56 the village of Newburg, in said county, the entire length of road being about eighty miles; and also all such additional branch roads as said party of the first part may hereafter construct in the State of Indiana, for the purpose of extending its tracts into the coal and mining regions in the vicinity of said main lines of road; with all its franchises, equipments, property, tolls, issues and profits, and all its lands, tenements, buildings, fixtures, machinery, goods and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing and erections, and all its rights of way and easements, and all cars, engines and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever pertinent thereto.

To have and to hold the said railway property, premises, interests, rights, and appurtenances mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance, unto the said party of the second part, as such trustees as aforesaid, and to their successors in said

54 EXHIBIT G.

Consolidated mortgage.

This indenture, made this twenty-fourth day of April, in the year one thousand eight hundred and seventy-two, between the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, party of the first part, and William R. Fosdick and James D. Fish, of the city and State of New York, trustees, upon certain trusts hereinafter specified and provided, the party of the second part.

Whereas the Chicago, Danville and Vincennes Railroad Company has heretofore issued, sold, and disposed of two thousand and five hundred of its first-mortgage bonds, of one thousand dollars each, numbered from one (1) to two thousand and five hundred (2,500), both inclusive, amounting in the aggregate to two millions and five hundred thousand dollars, which bonds are dated the tenth day of March, A. D. 1869, are due and payable on the first day of April, A. D. 1909, with semi-annual interest coupons attached thereto, payable on the first days of April and October in each year, until the maturity of said bonds, and both principal and interest payable in United States gold coin, and all of which bonds are now outstanding and unpaid;

And whereas said corporation, in order to secure the payment of the principal and interest of the said two millions and five hundred thousand dollars of bonds, did, under date of the tenth day of March, A. D. 1869, aforesaid, make and execute a certain mortgage or deed of trust to William R. Fosdick and James D. Fish, trustees, conveying to them, as said trustees, that division of the road of said corporation, situate, lying and being in the counties of Cook, Will, Kankakee, Iroquois, and Vermilion, in the State of Illinois, together with certain other property of said corporation, reference being had to the mortgage or deed of trust aforesaid, which is recorded in the several counties mentioned therein, for a more full description of the premises and property so conveyed, and embraced in said deed of trust, and for all other and further provisions contained therein;

And whereas the Chicago, Danville and Vincennes Railroad Company have made and executed certain other of its first-mortgage bonds, of one thousand dollars each, numbered from number two thousand five hundred and one (2,501) to four thousand (4,000), both inclusive, amounting in the aggregate to one million and five hundred thousand dollars, which bonds are dated on the 12th day of March, A. D. 1872, are due and payable on the first day of April, A. D. 1912, with semi-annual interest coupons attached thereto, payable on the first days of April and October in each year, until the maturity of said bonds,

55 and both principal and interest payable in United States gold coin, and which bonds said company are now about to sell and dispose of for the purpose of providing a portion of the means required for the construction and equipment of that division of its road situate n the State of Indiana;

i And whereas said corporation, in order to secure the payment of the principal and interest of said last-mentioned one million and five hundred thousand dollars of bonds, did, under date of the twelfth day of March, A. D. 1872, aforesaid, make and execute a certain other mortgage or deed of trust to William R. Fosdick and James D. Fish, trustees, conveying to them, as said trustees, that division of the road of said corporation, situate, lying and being in the counties of Warren, Fountain, Parke, and Clay, in the State of Indiana, together with certain other

property of said corporation, reference being had to the mortgage or deed of trust aforesaid, which is recorded in the several counties mentioned therein, for a more full description of the premises and property so conveyed and embraced in said deed of trust, and for all other and further provisions contained therein:

Now, for the purpose of more fully securing and assuring the punctual payment of the said two millions and five hundred thousand dollars of bonds, before mentioned, numbered from number 1 to number 2,500, both inclusive, and dated the tenth day of March, A. D. 1869, and due and payable on the first day of April, A. D. 1909, and every part thereof, and the interest thereon, to the persons who may become the holders of the same, or any of them:

This indenture witnesseth that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the said party of the second part, trustees as aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, in addition to the conveyance made by it to said party of the second part, by the indenture aforesaid, dated March 10, A. D. 1869, doth hereby grant, bargain, sell, enfeoff, release, assign and convey unto the said William R. Fosdick and James D. Fish, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire division of the railroad of the party of the first part, situate, lying and being in the State of Indiana, commencing on the boundary-line between the States of Illinois and Indiana, in the township of Marshfield and county of Warren, in the State of Indiana, at the point where it connects with the road of the party of the first part, terminating on the eastern boundary-line of the State of Illinois, in the town of Ross, in Vermilion County, in said last-named State, and distant about ten miles southeasterly from the village of Rossville, extending thence in a southeasterly direction to Covington, in Fountain County; thence southerly, to Montezuma, in Parke County, and thence southeasterly, to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad. Also, a branch road extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to
56 the village of Newburg, in said county, the entire length of road being about eighty miles; and also all such additional branch roads as said party of the first part may hereafter construct in the State of Indiana, for the purpose of extending its tracts into the coal and mining regions in the vicinity of said main lines of road; with all its franchises, equipments, property, tolls, issues and profits, and all its lands, tenements, buildings, fixtures, machinery, goods and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing and erections, and all its rights of way and easements, and all cars, engines and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever pertinent thereto.

To have and to hold the said railway property, premises, interests, rights, and appurtenances mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance, unto the said party of the second part, as such trustees as aforesaid, and to their successors in said

trust, or assigns, to and for the only use, benefit, and behoof of the said trustees, and their cestui que trust, their successors and assigns, forever; subject, however, to the prior lien provided for in a certain mort'age or deed of trust made by the party of the first part hereto to the party of the second part hereto, dated March 12th, 1872, to secure one million and five hundred thousand dollars of bonds, to be issued by the party of the first part, and hereinbefore referred to.

And for the purpose of more fully securing and assuring the punctual payment of the said one million and five hundred thousand dollars of bonds before mentioned, numbered from number 2501 to number 4000, both inclusive, and dated the 12th day of March, A. D. 1872, and due and payable on the first day of April, A. D. 1912, and every part thereof, and the interest thereon, to the persons who may become the holders of the same, or any of them.

This indenture further witnesseth that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the said party of the second part, trustees as aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, in addition to the conveyance made by it to said party of the second part by the indenture aforesaid, dated March 12th, A. D. 1872, doth hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the said William R. Fosdick and James D. Fish, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire railroad of the party of the first part, lying, being, and extending from its terminus, in the city of Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, being in length about one hundred and thirty miles, with all its franchises,
57 equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions, of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever pertinent thereto: To have and to hold the said railway property, premises, interests, rights, and appurtenances mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance, unto the said party of the second part, as such trustees aforesaid, and to their successors in said trust, or assigns, to and for the only use, benefit, and behoof of the said trustees, and their cestui que trust, their successors and assigns, forever; subject, however, to a prior lien provided for in a certain mortgage or deed of trust made by the party of the first part hereto to the party of the second part hereto, dated March 10th, A. D. 1869, to secure two millions and five hundred thousand dollars of bonds issued by the party of the first part, and hereinbefore referred to.

It is provided, however, that the grants and conveyances hereinbefore contained shall not include, nor operate to transfer, any lands, goods, chattels, property, machinery, equipment, or other matters which said company now owns, or may hereafter acquire, that need not be used for any purpose incident to the management or operation of said railway, or the repair thereof, or in the business of said railway company; nor any franchises, power, or corporate right to build that

portion of the line of railroad which by its charter it is authorized to locate and construct, and not embraced within the terminal points herein before described; but all which last mentioned franchises and right of way shall be wholly excepted and exempt from these presents and the grant and conveyance herein specified; nor shall these presents in any way prohibit the party of the first part from selling and conveying, or otherwise disposing of the same, and all the proceeds thereof; nor from receiving, using, and applying any money or personal property of said company to the repairs of said road or its appurtenances, or to its current expenses, or to the purchase of necessary machinery, or the renewal thereof; and the board of directors of said company may likewise distribute and pay any net annual incomes and profits to stockholders, after paying the interest on the said bonds, and providing for any sinking fund required to be created and kept. It is further provided, that all the property herein and hereby conveyed to the party of the second part shall be held by them in special trust and confidence, and upon the conditions following, that is to say:

1st. That these conveyances are for, and shall be, by the said party of the second part, their successors and assigns, held, used, and owned solely for the benefit and protection and securiety of the persons and corporation who shall hold and own the bonds issued as aforesaid by the party of the first part, and for enforcing the stipulations of said company as to said issue of bonds, and the disposal thereof, and securing the same, and the final payment thereof, in their true intent and meaning, whether contained in said bonds, or the interest-warrants attached to them, or in this deed.

58

2d. That for the better assuring and confirming the title and powers of the said party of the second part, their successors and assigns, in the said premises and property hereby conveyed, and in and to any premises and property or rights hereafter accruing, or to be acquired by said party of the first part, appurtenant to said railroad, which is intended to pass or be passed by this conveyance, the said party of the first part, their successors and assigns, will and shall, as often as may be lawfully required by the party of the second part, or their successors or assigns, holding the above-granted trust do such acts, and make such other and further conveyances and assurances in law as such party in the second part shall, by counsel learned in the law, be advised are necessary for the better carrying out of the object of the parties to this mortgage or deed or trust.

3d. That if the said party of the first part, their successors or assigns, shall well and truly pay to the holders of said bonds, so issued and secured, the respective sums of money and interest due and accruing on said bonds on the days and times therein mentioned, and according to the tenor and effect of said bonds, then and thenceforth this indenture, and all the estate hereby granted, shall become and be utterly void and of no further effect; and the same shall be, by such payment, wholly annulled and satisfied, without any further receipt or entry of satisfaction of record whatever, but shall be, if required, entered and certified on any record of the same as so satisfied by the party of the second part or their successors.

4th. That until default shall have been made by the party of the first part in the payment of principal or interest of the said bonds, or some of them or, until default shall have been made in respect to something herein required to be done by the said party of the first part, the said party of the first part shall be suffered and permitted to possess, use, occupy, manage, and operate the said railroad property, and franchises,

and appurtenances, and to renew, replace, and repair the same, and every part thereof, and take and receive and use the tolls, rents, issues, incomes, and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

5th. In case default shall be made in the payment of any interest on any of the aforesaid bonds issued or to be issued, according to the tenor of the coupons thereto annexed, or of the provisions hereof; or in case default shall be made in the payment of the principal of said bonds, or any of them, when the same shall become due, without the consent of the holder of such bond on which such default shall occur, the said party of the first part hereby covenants and agrees to and with the party of the second part, and their successors and assigns, that within six months after such default shall have occured, the same default still continuing, the said party of the first part, on demand of the said trustee or trustees for the time being, shall and will surrender to him
59 or them, or to their agent, the actual possession of the herein granted and demised railroad and premises, together with all the books, records, papers, accounts, and money of said company, and all management and control thereof; and that all the expenses of taking, holding, managing, and operating said property, if possession be so taken, shall be paid from the incomes and profits thereof; and if said property shall, after such taking possession thereof, be sold, then from the sale thereof; or such expenses may be paid from the sale of any personal property, as the said trustees may deem proper; and that said party of the second part, and their successors, having taken such possession, may manage, operate, and control said road and property and all of its affairs, and appoint all needful agents and employees for that purpose, and pay the same, and receive all the incomes, issues, and profits thereof, and apply the same to the payment of said interest so in default, according to the true intent and tenor of the said bonds and the coupons annexed, and to the terms of this deed, until such default shall have been satisfied, if such incomes and profits will satisfy the same; first paying all expenses of such possession and management, and all taxes, assessments, and charges on said property, and a just compensation for their own services as such trustees. But in any and all cases of such taking of possession by said party of the second part, and paying up any such default, and the expenses aforesaid, the said party of the second part shall immediately thereafter redeliver the said railway and premises, books, records, and money and accounts into the possession of the party of the first part: Provided, that no such demand for such possession shall be made by said trustee or trustees until they shall have been required by the holders of at least the one-half of all of the said issue of bonds which shall then be unpaid and outstanding to make such demand, and to take such possession of said road and property.

6th. That in case default shall be made as aforesaid, and shall continue as aforesaid, it shall be lawful for the party of the second part, or their successors in said trust, after entry as aforesaid, or other entry, or without entry, personally, or by agent or attorney, to sell and dispose of, to the highest bidder, all and singular the premises hereby conveyed, or intended so to be, at public auction in the city of Chicago, in the State of Illinois, or in the city of Indianapolis, in the State of Indiana, at such time as said party of the second part may appoint, first having demanded of the party of the first part full payment of all money then in default, and also first having given sixty days' notice of such time and place of sale, and a full description of the property so to be sold, by advertisement thereof in three newspapers, one published in Chicago

in the State of Illinois, one published in Indianapolis in the State of Indiana, and one published in the city of New York; and to adjourn said sale from time to time in their discretion; and, if adjourned, to make such sale in manner aforesaid, without further notice, at the time and place to which it may be adjourned; and upon such sale, and receiving the purchase-money therefor, to convey the same, by good and sufficient conveyances, to the purchaser or purchasers; and such sale and conveyance, so made, shall convey all the right, title, estate, interest, and property of the said party of the first part, of, in, and to the said road, premises, franchises, and property to the said purchaser, in fee simple, forever; and shall be a perpetual bar, both in law and equity, against the said party of the first part, and their successors and assigns, and against all and every person claiming or to claim the said premises, or any part thereof, under them, forever. After deducting from the proceeds of such sale the expenses of the sale and conveyance, and all advances or liabilities which may have been made or incurred by the party of the second part in operating and controlling and maintaining the said railroad and property, and in managing its business and affairs while in possession, and all payments for taxes, charges, and assessments on said premises, or any part thereof, as well as reasonable compensation for their own services, to apply the proceeds of such sale to the payment of the interest on said bonds, or so many of them as shall have been issued by said party of the first part, and be then outstanding, pro rata, until all such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds, pro rata, until such principal shall be paid; and if any surplus remain after paying all of said matters, to pay such surplus to the party of the first part; and such payments shall be so made on said bonds, whether the same shall have become due or not at the time of such sale.

It is hereby declared that the receipt of said trustee or trustees, making any such sale to the purchaser of the premises for the purchase money, shall be a full and sufficient discharge of such purchaser therefor, and that said purchaser shall not after payment of said purchase money, and obtaining such receipt therefor, be liable, or in any way bound, to see said purchase money applied to this trust, or otherwise, or in any manner answerable for its loss or misapplication, or obliged to inquire into the authority for making such sale.

7th. At any sale of the property aforesaid, or any part thereof, made by virtue of these presents, or by judicial authority, the said trustee or trustees may bid for and purchase, or cause to be purchased, the property so sold, or any part of it, in behalf of the holders of said bonds secured by this deed then outstanding, at a reasonable price, if only a part be sold; but, if the whole property be sold, at a price not exceeding the whole amount of said bonds and interest then outstanding.

8th. If default be made by the party of the first part in the payment of any half year's interest on any of said bonds, and the warrant or coupon for such interest shall have been presented, and its payment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all of the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and upon the written request of the holders of a majority of the said bonds then outstanding shall proceed to collect both principal and

interest of all such bonds outstanding, by foreclosure and sale of said property or otherwise, as herein provided.

9th. It is hereby mutually agreed by the parties hereto that
61 the trustees shall be responsible only for gross negligence and willful default, and that they shall not be bound to do any act touching the execution of the trust, except at their own option, which may involve them in personal expense or liability, unless first duly and satisfactorily indemnified against the same by one or more of said bondholders.

In case of the death, resignation, or inability to act of any trustee, the board of directors may appoint a successor, and, failing to so appoint, any court of competent jurisdiction may appoint a trustee to fill such vacancy, on the application of the holders of the one-sixth part of the bonds hereby intended to be secured then outstanding, and such appointment by the board or by such court shall invest the trustee so appointed with all the interest, estate, power, and authority in the premises, and subject him or them to the same obligations hereby given and granted to the party of the second part herein.

The foregoing grants, conveyances, and covenants in this indenture contained, are made and entered into by the Chicago, Danville and Vincennes Railroad Company, party of the first part hereto, upon the express understanding, agreement, and condition, that in case the party of the first part, or its successors or assigns, shall deem it necessary or desirable, at any future time, in consequence of an increase of the traffic of the said railroad, to issue and dispose of any amount of bonds, or other evidences of indebtedness, for the purpose of providing the means for the purchase of additional rolling-stock and equipment for the use of said railroad or of said company, its successors or assigns, or for the improvement of said railroad or property, that then, and in that case, the said Chicago, Danville and Vincennes Railroad Company, its successors or assigns, may secure the payment of the principal and interest of such bonds or other evidences of indebtedness so issued and disposed of, by mortgage upon all the roads and property of said company hereinbefore mentioned and described, and that such mortgage, when so made and executed, shall constitute and be and become a lien upon all said roads and property prior to, and having precedence of, the liens hereinbefore provided for by this instrument.

In witness whereof the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, has caused these presents to be executed and signed by the president of their company, and attested by their secretary, in their behalf and for the said company, and has caused the corporate seal of the company to be hereto affixed, the day and year first above written. And the parties of the second part have hereunto set their hands and affixed their seals the same day and year aforesaid.

[SEAL.] CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

Attest, J. S. CAMPBELL, *Secretary.*
WM R. FOSDICK, [SEAL.]
JAMES D. FISH, [SEAL.]
Trustees.

62 STATE OF NEW YORK,
City and County of New York, ss:

Before me, the undersigned, a notary public of the State of New York, in the city of New York, duly commissioned and qualified, came

this day William D. Judson, to me personally known, and also known by me to be the president of the Chicago, Danville and Vincennes Railroad Company, the party of the first part in the above deed of trust, and who executed the same on behalf of said company, and acknowledged that the said railroad company, and he, as the president of said company, and in its behalf, did sign, seal, and deliver the said indenture and deed of trust, as and for its own act and deed, and for the uses and purposes therein mentioned.

Also personally appeared before me, at the same time, the above-named William R. Fosdick and James D. Fish, trustees, and the party of the second part in the foregoing mortgage and deed of trust, and personally known to me as the persons who signed the same as such, and acknowledged that they did sign, seal, and execute the same, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this twenty-fifth day of April, anno Domini 1872.

[SEAL.] J. A. WELCH,
Notary Public, New York City and County.

63 EXHIBIT H.

Certificate of indebtedness of the Chicago, Danville and Vincennes Railroad Co.

Principal and interest payable in United States gold coin.

$.] [No. .

The Chicago, Danville and Vincennes Railroad Company acknowledges itself indebted to , or bearer, dollars, payable on the first day of February, 1879, with interest from and after February 1st, 1874, at seven per cent. per annum, payable semi-annually, on the first days of February and August in each year, at the office or agency of said company, in the city of New York, on the delivery of the annexed interest warrants at such place as may be designated by said company, by advertisement published in said city, and both principal and interest payable in United States gold coin.

This certificate is issued by the Chicago, Danville and Vincennes Railroad Company in exchange for a like amount of interest coupons from its first-mortgage bonds, maturing in equal proportions on the following dates, viz: October 1st, 1873, April 1st, 1874, October 1st, 1874, and April 1st, 1875, from bonds numbered as specified in the trustee's certificate hereto attached, for the purpose of deferring the payment of said coupons until the maturity of this certificate. The coupons aforesaid having been deposited in trust with William R. Fosdick, trustee, for the benefit, protection, and security of the holder hereof.

It is agreed on the part of said Chicago, Danville and Vincennes Railroad Company, that in case of the non-payment of the interest hereon on demand, at any time when due, or in case of the non-payment of the coupons from its first-mortgage bonds, maturing October 1st, 1875, and on the first days of April and October in each succeeding year, until the payment of this certificate, or in case of the non-payment of the principal of this certificate at maturity, that the holder hereof, in such case, hall be entitled to demand of and receive from the trustee above named the interest-coupons hereinbefore mentioned, with all their rights to proceed against the company, upon the surrender of this certificate to said trustee.

In testimony whereof the said company have caused the foregoing to be attested on its behalf by its president and treasurer, and its corporate seal to be affixed hereto, at the city of Chicago, in the State of Illinois, this twentieth day of November, 1873.

President.

Treasurer.

I hereby certify that I have received interest coupons from the first-mortgage bonds of the Chicago, Danville and Vincennes Railroad Company, number , amounting to dollars, as stated in the above certificate of indebtedness, which I hold in trust, upon the terms and conditions above expressed.

Trustee.

[8 .

The Chicago, Danville & Vincennes Railroad Company will pay the bearer, at its agency in the city of New York, dollars, in coin, on the first day of February, 1879, for semi-annual interest on its "certificate of indebtedness."

No. .

Treasurer.

EXHIBIT I.

64 *Mortgage to secure convertible mortgage bonds.*

FORM OF MORTGAGE.

This indenture, made this sixteenth day of December, in the year one thousand eight hundred and seventy-two, between the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, party of the first part, and James D. Fish and James W. Elwell, of the city and State of New York, trustees, upon certain trusts hereinafter specified and provided, the party of the second part:

Whereas the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, under and in pursuance of the provisions of the acts incorporating the same, are constructing and operating a railroad in said States, commencing at the city of Chicago, and extending southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, in Illinois, to the city of Danville, and also extending from a point on the line above described, distant about twelve miles north of Danville aforesaid, in a southeasterly direction, to the boundary-line of the State of Indiana, and thence in said last-named State in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also, a branch road, extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg, in said county; and is now engaged in constructing and operating the same.

And whereas at a meeting of the board of directors of the said Chicago, Danville and Vincennes Railroad Company, the party of the first

part, held pursuant to law, on the fourteenth day of December, in the year one thousand eight hundred and seventy-two, the said board of directors resolved and enacted an order and resolution as follows, to wit:

"Whereas in consequence of an increase of the traffic of this company's road it has become necessary to provide the means for the purchase of additional rolling-stock and equipment for the use of the company, and for the improvement of the company's road and property: Therefore,

"Resolved, That an issue of bonds shall be made by the company, designated 'Convertible mortgage bonds,' amounting to one million of dollars, eight hundred of said bonds to be for the sum of $1,000 each, and four hundred of said bonds to be for the sum of $500 each, all of said bonds to bear seven per cent. per annum interest, payable semi-annually on the first days of February and August in each year, and the principal to be payable on the first day of February, 1893, and both principal and interest to be payable in United States gold coin, in the city of New York; each bond to be convertible into the capital stock of the company at par, at any time before maturity, upon thirty days' written notice to the company, and each bond to contain an express waiver of all recourse by the holder of the same to any individual liability of the stockholders of this company.

"That said bonds shall be dated as made on the first day of January, A. D. 1873.

"In case default be made in payment of any half year's interest on any of said bonds, and the warrant of said interest shall have been presented and its payment demanded, and such default shall have continued for six months after such demand, without the consent of the holder of said coupon or bond, then and thereupon the principal of all such bonds shall become immediately due and payable. That a warrant for each semi-annual payment of interest shall be made and authenticated, for and on behalf of this company, by the secretary of this company, and annexed to each bond. That said bonds shall be prepared by the president of the company, and signed by him for and on behalf of this company, and attested by the treasurer, and shall have annexed to them a certificate of authentication of the trustee or trustees, under the mortgage made to secure them, and shall not be issued or obligatory without such certificate.

"That for the purpose of securing the final payment of said issue of $1,000,000 of bonds, with all interest to accrue thereon, this company will make and deliver to James D. Fish and James W. Elwell, as trustees, a mortgage and deed of trust, conveying to said persons as trustees, for the benefit of every holder of such bonds, or any of them, all the road of this company, extending from Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, in said State of Illinois, and also extending from a point on the line above described, situate about twelve miles north of Danville aforesaid, in a southeasterly direction to the boundary-line of the State of Indiana; and thence in said last-named State in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County; and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad. Also a branch road extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg, in said county, and also all such additional branch roads as this company may hereafter construct, for the purpose of extending its tracks into the coal and

mining regions in the vicinity of its said main lines of road, with all the property, rights, and franchises of this company, of every kind and description whatever pertinent to said roads, between all said terminal points, and all the income to be had and derived from operating the same—in trust, to secure the final payment of said bonds as aforesaid—with all the rights, covenants, powers, and authority, in case default be made by this company in such payments as in said deed of trust
66 shall be specified, to foreclose said mortgage, and to sell the property so mortgaged, or to take possession of and operate the same, and receive the incomes thereof; but not, in any case, before any default, to disturb or interfere with this company in the possession, control, and management thereof, or from receiving the incomes thereof, or from selling or exchanging any of the personal property, or machinery, or equipments thereof, or any of the lands or real estate, not necessary for the use and operation of the railroad; as to all of which, as will be in said mortgage and deed of trust specifically stated, agreed upon, and set forth. That the president of this company is hereby authorized and fully empowered to make and sign, and execute, and seal with the corporate seal of this company, the said mortgage and deed of trust, and to acknowledge the same for and on behalf of this company for record; and on the acceptance of said trust, and signing the said deed by the said trustees, to cause the same to be recorded according to law, and thereupon to make, sign, execute, and prepare said $1,000,000 of bonds for issue and sale, as shall be hereafter ordered by this board."

And whereas the said Chicago, Danville and Vincennes Railroad Company, party of the first part, hath, in accordance with the provisions of said order and resolution, made and executed bonds to the amount of one million dollars, of the form, denomination, and character prescribed by said order and resolution, and hold the same to be authenticated, issued, used, and disposed of, for the purposes in said order and resolution stated:

Now, therefore, in further pursuance of said order and resolution, and to the end and purpose of securing and assuring the punctual payment of said one million dollars of bonds, and every part thereof, which may be issued, to the persons who may become the holders of the same, or any of them:

This indenture witnesseth, that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the said party of the second part, trustees as aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, doth hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the said James D. Fish and James W. Elwell, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire railroad of the party of the first part, lying, being, and extending from its terminus in the city of Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, in said State of Illinois, and also extending from a point on the line above described, situate about twelve miles north of Danville aforesaid, in a southeasterly direction to the boundary-line of the State of Indiana, and thence in said last-named State in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad. Also, a branch road extending from the main line before described, commencing at a point

on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the
67 village of Newburg, in said county, the entire length of road being about two hundred and ten miles; and also all such additional branch roads as said party of the first part may hereafter construct, for the purpose of extending its tracks into the coal and mining regions in the vicinity of said main lines of road; with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between all said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever pertinent thereto. Provided, however, that this grant and conveyance aforesaid shall not include nor operate to transfer any lands, goods, chattels, property, machinery, equipment, or matters which said company now owns, or may hereafter acquire, that need not be used for any purpose incident to the management or operation of said railway, or the repair thereof, or in the business of said railway company; nor any franchises, power or corporate right to build that portion of the line of railroad which, by its charter, it is authorized to locate and construct, and not embraced within the terminal points hereinbefore described; but all which last-mentioned franchises and right of way shall be wholly excepted and exempt from these presents, and the grant and conveyance herein specified; nor shall these presents in any way prohibit the party of the first part from selling and conveying or otherwise disposing of the same, and all the proceeds thereof; nor from receiving, using, and applying any money or personal property of said company to the repairs of said road or its appurtenances, or to its current expenses, or to the purchase of necessary machinery, or the renewal thereof; and the board of directors of said company may likewise distribute and pay any net annual incomes and profits to stockholders, after paying the interest on the said bonds, and providing for any sinking fund required to be created and kept. To have and to hold the said railway property, premises, interests, rights, and appurtenances mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance, unto the said party of the second part, as such trustees as aforesaid, and to their successors in said trust, or assigns, to and for the only use, benefit, and behoof of the said trustees and their *cestui que trust*, their successors and assigns forever; but in special trust and confidence, and upon the conditions following, that is to say:

1st. That this conveyance is for, and shall be by, the said party of the second part, their successors and assigns, held, used, and owned solely for the benefit and protection and security of the persons and corporations who shall own and hold the bonds about to be issued as aforesaid by the party of the first part, and for enforcing the stipulations of said company as to said issue of bonds, and the disposal thereof, and securing the same, and the final payment thereof, in their true in-
68 tent and meaning, whether contained in said bonds, or the interest warrants attached to them, or in this deed.

2d. That for the better assuring and confirming the title and powers of the said party of the second part, their successors and assigns, in the said premises and property hereby conveyed, and in and to any premi-

ses and property or rights hereafter accruing or to be acquired by said party of the first part, appurtenant to said railroad, which is intended to pass or be passed by this conveyance, the said party of the first part, their successors and assigns, will and shall, as often as may be lawfully required by the party of the second part, or their successors or assigns, holding the above-granted trust, do such acts, and make such other and further conveyances and assurances in law as such party of the second part shall, by counsel learned in law, be advised are necessary for the better carrying out of the object of the parties to this mortgage or deed of trust.

3d. That if the said party of the first part, their successors or assigns, shall well and truly pay to the holders of said one million dollars of bonds, so to be issued and hereby secured, the respective sums of money and interest due and accruing on said bonds on the days and times therein mentioned, and according to the tenor and effect of said bonds, then and thenceforth this indenture, and all the estate hereby granted, shall become and be utterly void and of no further effect; and the same shall be, by such payment, wholly annulled and satisfied, without any further receipt or entry of satisfaction of record whatever, but shall be, if required, entered and certified on any record of the same as so satisfied by the party of the second part, or their successors.

4th. That until default shall have been made by the party of the first part in the payment of principal or interest of the said bonds, or some of them, or until default shall have been made in respect to something herein required to be done by the said party of the first part, the said party of the first part shall be suffered and permitted to possess, use, occupy, manage, and operate the said railroad property, and franchises, and appurtenances, and to renew, replace, and repair the same, and every part thereof, and take and receive and use the tolls, rents, issues, incomes, and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

5th. In case default shall be made in the payment of any interest on any of the aforesaid bonds issued or to be issued, according to the tenor of the coupons thereto annexed or of the provisions hereof; or in case default shall be made in the payment of the principal of said bonds, or any of them, when the same shall become due, without the consent of the holder of such bond on which said default shall occur, the said party of the first part hereby covenants and agrees to and with the party of the second part, and their successors and assigns, that within six months after such default shall have occurred, the same default still continuing, the said party of the first part, on demand of the said trustee or trustees for the time being, shall and will surrender to him or them, or to their agent, the actual possession of the herein granted and demised railroad and premises, together with all the books, records,
69 papers, accounts, and money of said company, and all management and control thereof; and that all the expenses of taking, holding, managing, and operating said property, if possession be so taken, shall be paid from the income and profits thereof; and if said property shall, after such taking possession thereof, be sold, then from the sale thereof; or such expenses may be paid from the sale of any personal property, as the said trustees may deem proper; and that said party of the second part, and their successors, having taken such possession, may manage, operate, and control said road and property, and all of its its affairs, and appoint all needful agents and employes for that purpose, and pay the same, and receive all the incomes, issues, and profits thereof, and apply the same to the payment of the said interest so in

default, according to the true intent and tenor of the said bonds and the coupons annexed and to the terms of this deed, until such default shall have been satisfied, if such incomes and profits will satisfy the same—first paying all expenses of such possession and management, and all taxes, assessments and charges on said property, and a just compensation for their own services as such trustees. But in any and all cases of such taking of possession by said party of the second part, and paying up any such default, and the expenses aforesaid, the said party of the second part shall immediately thereafter re-deliver the said railway and premises, books, records, and money and accounts into the possession of the party of the first part; provided that no such demand for such possession shall be made by said trustee or trustees until they shall have been required by the holders of at least the one-half of all the said issue of bonds which shall then be unpaid and outstanding to make such demand and to take such possession of said road and property.

6th. That in case default shall be made as aforesaid, and shall continue as aforesaid, it shall be lawful for the party of the second part, or their successors in said trust, after entry as aforesaid, or other entry, or without entry, personally, or by agent or attorney, to sell and dispose of, to the highest bidder, all and singular the premises hereby conveyed, or intended so to be, at public auction, in the city of Chicago, in the State of Illinois, or in the city of Indianapolis, in the State of Indian, at such time as said party of the second part may appoint, first having demanded of the party of the first part full payment of all money then in default; and also first having given sixty days' notice of such time and place of sale, and a full description of the property so to be sold, by advertisement thereof in three newspapers; one published in Chicago, in the State of Illinois, one published in Indianapolis, in the State of Indiana, and one published in the city of New York; and to adjourn said sale from to time, in their discretion, and, if adjourned, to make such sale in manner aforesaid, without further notice, at the time and place to which it may be adjourned; and upon such sale, and receiving the purchase-money therefor, to convey the same, by good and sufficient conveyances, to the purchaser or purchasers; and such sale and conveyance so made shall convey all the right, title, estate, interest, and property of the said party of the first part of, in, and to the said road, premises, franchises, and property to the said purchaser, in fee-simple, forever; and shall be a perpetual bar, both in law equity, against the said party of the first part, and their successors and assigns, and against all and every person claiming or to claim the said premises, or any part thereof, under them, forever. After deducting from the proceeds of such sale the expenses of the sale and conveyance, and all advances or liabilities which may have been made or incurred by the party of the second part in operating and controlling and maintaining the said railroad and property, and in managing its business and affairs while in possession, and all payments for taxes, charges, and assessments on said premises, or any part thereof, as well as reasonable compensation for their own services, to apply the proceeds of such sale to the payment of the interest on said bonds, or so many of them as shall have been issued by said party of the first part and be then outstanding pro rata until such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds pro rata until such principal shall be paid; and if any surplus remain after paying all of said matters, to pay such surplus to the party of the

first part; and such payments shall be so made on said bonds whether the same shall have become due or not at the time of such sale.

It is hereby declared that the receipt of said trustee or trustees, making any such sale to the purchaser of the premises for the purchase-money, shall be a full and sufficient discharge of such purchaser therefor, and that said purchaser shall not, after payment of said purchase-money, and obtaining such receipt therefor, be liable, or in any way bound to see said purchase-money applied to this trust, or otherwise, or in any manner answerable for its loss or misapplication, or obliged to inquire into the authority for making such sale.

7th. At any sale of the property aforesaid, or any part thereof, made by virtue of these presents, or by judicial authority, the said trustee or trustees may bid for and purchase, or cause to be purchased, the property so sold, or any part of it, in behalf of the holders of said bonds secured by this deed then outstanding, at a reasonable price, if only a part be sold; but if the whole property be sold, at a price not exceeding the whole amount of said bonds and interest then outstanding.

8th. If default be made by the party of the first part in the payment of any half year's interest on any of said bonds, and the warrant or coupon for such interest shall have been presented and its payment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and, upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interst of all such bonds outstanding, by foreclose and sale of said property or otherwise, as herein provided.

9th. It is hereby mutually agreed by the parties hereto, that the trustees shall be responsible only for gross negligence and willful de-
71 fault, and that they shall not be bound to do any act touching the execution of the trust, except at their own option, which may involve them in personal expense or liability, unless first duly and satisfactorily indemnified against the same by one or more of said bondholders.

In case of the death, resignation, or inability, to act of any trustee, the board of directors may appoint a successor, and failing to so appoint, any court of competent jurisdiction may appoint a trustee to fill such vacancy, on the application of the holders of the one-sixth part of the bonds hereby intended to be secured, then outstanding, and such appointment by the board or by such court shall invest the trustees so appointed with all the interest, estate, power, and authority in the premises, and subject him or them to the same obligations hereby given and granted to the party of the second part herein.

In witness whereof the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, has caused these presents to be executed and signed by the president of their company, and attested by their secretary, in their behalf and for the said company, and has caused the corporate seal of the company to be hereto affixed, the day and year

first above written. And the parties of the second part have hereunto set their hands and affixed their seals, the same day and year aforesaid.

[SEAL.] CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

Executed in presence of—
H. A. GILDERSLEEVE,
R. N. WHITLOCK.

JAMES D. FISH, [SEAL.]
JAMES W. ELWELL, [SEAL.]
Trustees.

J. S. CAMPBELL,
Secretary.

STATE OF NEW YORK,
City and County of New York, ss:

Before me, the undersigned, a notary public of the State of New York, in the city of New York, duly commissioned and qualified, came this day William D. Judson, to me personally known, and also known by me to be the president of the Chicago, Danville and Vincennes Railroad Company, the party of the first part in the above deed of trust, and who executed the same on behalf of said company, and acknowledged that the said railroad company, and he, as the president of said company, and its behalf, did sign, seal, and deliver the said indenture and deed of trust as and for its own act and deed, and for the uses and purposes therein mentioned.

Also personally appeared before me, at the same time, the above-named James D. Fish and James W. Elwell, trustees, and the
72 party of the second part in the foregoing mortgage and deed of trust, and both personally known to me as the persons who signed the same as such, and each acknowledged that he did sign, seal, and execute the same for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this nineteenth day of December, anno Domin, 1872.

[SEAL.] H. A. GILDERSLEEVE,
Notary Public, New York City and County.

EXHIBIT K.

Chattel mortgage.

This indenture, made the twelfth day of January, A. D. one thousand eight hundred and seventy-five, between the Chicago, Danville and Vincennes Railroad Company, a corporation existing under the laws of the States of Illinois and Indiana, party of the first part, and R. Biddle Roberts, of the city of Chicago and State of Illinois, trustee, upon certain trusts hereinafter specified and provided, the party of the second part, witnesseth as follows:

That the party of the first part, in order to pay off and discharge certain debts and obligations incurred in the construction, equipment, and operating of said railroad, and to enable them to conduct, operate, and continue the business of said company, and also in pursuance of the resolutions of said company passed the second day of January, A. D. 1875, a copy of which resolutions is hereto annexed, marked "A," and forming part of this indenture, have made and issued their several bonds or obligations, all having even date herewith, and which are numbered and are of the several denominations following, to wit: Nine hundred and

fifteen bonds of one thousand dollars each, numbered from number 1 to 915, both inclusive; one hundred bonds of five hundred dollars each, numbered from number 916 to 1015, both inclusive; one hundred bonds of two hundred and fifty dollars each, numbered from 1016 to 1115, both inclusive; and one hundred bonds of one hundred dollars each, numbered from 1116 to 1215, both inclusive; and each of said bonds being made payable to said party of the second part, or bearer, at the said company's office, in the city of Chicago, on the twelfth day of January, A. D. 1877, with interest thereon at the rate of seven per cent. per annum from the date thereof.

Now, this indenture witnesseth that the party of the first part, in order to secure the payment of the said several bonds hereinbefore mentioned as they respectively fall due, in the hands of bona-fide holders thereof, and the interest thereon, and in consideration of the sum of one dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bar-
73 gained, sold, assigned, released, conveyed, and confirmed, and by these presents do grant, bargain, and sell, assign, release, convey, and confirm, transfer and set over, unto the said party of the second part, trustee as aforesaid, and his successors or assigns, all the locomotives, passengers-cars, baggage-cars, freight-cars, shop-tools, and all other machinery and personal property, now owned by or in the possession of the said party of the first part, and more particularly named and described in the schedule hereto annexed marked "B," and which said schedule forms a part of this indenture, subject, however, to such prior liens as there may be upon the same, or upon any portion thereof, if any such prior liens exist.

To have and to hold the same to the said party of the second part, or to his successors or assigns, forever. And it is hereby further mutually declared, granted, and agreed by the said company, party of the first part, and said party of the second part, trustee, representing the rights and interests in the securities of the parties taking or holding the said bonds and obligations, in the form and manner following, viz: That if the said party of the first part shall well and faithfully pay the said principal sum of said bonds, on the day when the same are made payable by this indenture, as above mentioned, according to the true intent and meaning thereof, with the interest due thereon, or shall deliver up, cancelled, to the said party of the second part, all of the said bonds mentioned herein, then these presents shall cease and determine; that until default shall have been made by the party of the first part, in the payment of the principal or interest of the said bonds, or some of them, or until default shall have been made in respect to something herein required to be done by the said party of the first part, shall be suffered and permitted to possess, use, occupy, manage, and operate all of the chattels and property mentioned herein, and to renew and repair the same and every part thereof, and take and receive, and use, the tolls, rents, issues, incomes, and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

But if default shall be made by the party of the first part in the payment of said bonds or obligations, at the time they shall fall due, according to the true intent and meaning thereof, then it shall be lawful for the said party of the second part, or his successors or assigns, and it shall be his or their duty, and they are hereby authorized and empowered, either in person or by attorney, or by his agents, to take possession of the said chattels, and all other articles mentioned in the said annexed schedule, and to sell or dispose of the same, or any part thereof, at pub-

lic auction, at the best price he can obtain for the same, according to the statute in such cases made and provided, and out of the proceeds arising from such sale to defray the expenses of such sale, and his own just and lawful charges, and then pay over the proceeds to and amongst the parties holding the said bonds or obligations, so far as may be necessary to pay the amount then due and in arrears upon the same, and the balance of the proceeds (if any there be) to be paid over to the said parties of the first part, or their assigns.

In witness whereof the said Chicago, Danville and Vincennes
74 Railroad Company, the party of the first part, has caused these presents to be executed and signed by the president of their company, in their behalf and for the said company, and has caused the corporate seal of the company to be hereto affixed, the day and year first above written, and the party of the second part has hereunto set his hand and affixed his seal, the same day and year aforesaid.

(Signed) [SEAL OF CO.] CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

[Signed) [SEAL.] R. BIDDLE ROBERTS, *Trustee.*

STATE OF ILLINOIS,
County of Cook, ss:

This chattel mortgage was acknowledged before me by W. D. Judson, president of the Chicago, Danville and Vincennes Railroad Company, and R. Biddle Roberts, the said trustee, and entered by me this thirteenth day of January, A. D. 1875.

(Signed) J. CHARLES HAINES,
Justice of the Peace.

EXHIBIT A.

Resolved, That an issue of bonds shall be made by the company, amounting in the aggregate to a sum not exceeding one million of dollars, in such denominations as the officers of the company may deem advisable, payable in not exceeding two years from date of issue, either with or without interest, and that the said bonds be secured by a chattel mortgage to a trustee or trustees, upon all the locomotives, passenger-cars, baggage and freight cars, and all other machinery and shop-tools and other personal property now owned by or in possession of the company, subject to such prior liens as there may be upon the same in favor of the bondholders of the company, or any other parties, if any such prior liens exist, and that the president of company be, and he hereby is, authorized, directed, and fully empowered to make and sign, and execute and seal, with the corporate seal of the company, the said chattel mortgage or deed of trust, and to acknowledge the same for and on behalf of this company for record, and on the acceptance of said trust by the said trustee or trustees, to cause the same to be recorded according to law, and thereupon to make, sign, execute, and prepare the said bonds for issue, and to use and dispose of the said bonds to settle and pay, or to secure, any portion of the indebtedness of this company.

75 EXHIBIT B.

Thirty-four (34) locomotive-engines, numbered from No. 1 to 34, both inclusive.

Three hundred and seventy-six (376) gondola coal-cars, numbered from 1 to 376, both inclusive.

One hundred and fifteen (115) stock-cars, numbered from No. 501 to 615, both inclusive.

One hundred and fifteen (115) box-cars, numbered from No. 1,001 to 1,115, both inclusive.

Two hundred and twenty-five (225) gondola coal-cars, numbered from No. 0141 to 0365, both inclusive.

Six (6) caboose-cars, numered from No. 1 to 6, both inclusive.

Four (4) baggage-cars, numbered from No. 1 to 4, both inclusive.

Three (3) mail and passengers coaches, numbered from No. 1 to 3, both inclusive.

Eight (8) passenger-coaches, numbered from No. 1 to 8, both inclusive.

The following machinery and tools in the machine-shops at Danville, Vermillion County, Illinois:

1 44-inch iron planer.
1 30-inch iron planer.
2 14-inch shaping-machines.
1 slotting-machine.
1 lathe, 34-inch swing.
1 lathe, 16-inch swing.
1 lathe, 20-inch swing.
1 lathe, 25-inch swing.
1 axle-centreing lathe.
1 hydraulic wheel press.
1 driving wheel press.
1 car-wheel borer.
1 boiler-maker's shears.
1 boiler-maker's punch.
1 hydraulic crank-pin press.
1 steam hammer.
1 bolt cutter.
1 small emery grinder.
1 axle lathe.
1 drilling press.
1 drilling press.
1 stationary steam-engine.

(Endorsed:) Filed September 14, A. D. 1875. W'm H. Bradley, cl'k.

75a Afterwards, to wit, on the 8th day of October, 1875, said receiver, by his solicitor, filed in said clerk's office his petition in said entitled case, which said petition is in the words and figures following, to wit:

Petition of Adna Anderson.

76 In the circuit court of the United States, northern district o Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH
vs.
CHICAGO, DANVILLE AND VINCENNES RAILROAD Company et al. } In chancery.

To the honorable the judge of said court in chancery sitting:

The petition of Adna Anderson, receiver herein, respectfully represents to the court that, by two certain written agreements, entered into by and between the said Chicago, Danville and Vincennes Railroad Company and the Hinchley Locomotive Works, bearing date respectively the first day of September and the eighth day of October, A. D. 1873, copies of each of which are hereto attached, and made a part hereof, the said railroad company contracted to purchase five locomotive-engines, described in said contracts, which were delivered to the said company under the terms and conditions therein contained.

That said railroad company, in consideration therefor, executed and delivered to said locomotive works its several promissory notes, as provided in said contracts, amounting in the aggregate to the sum of sixty-seven thousand and five hundred dollars, which, from time to time, have been returned by the parties thereto, as provided in said contracts.

77 But no part of the same, either of principal or interest, has been paid, and that the following-described promissory notes are now outstanding, to wit:

No. 756, dated Oct. 10, 1874, for five thousand dollars.
" 757, " Oct. 10, 1874, " five thousand dollars.
" 762, " Oct. 10, 1874, " two thousand dollars.
" 763, " Oct. 10, 1874, " ten hundred forty-eight & $\frac{04}{100}$ dollars.
" 780, " Nov. 9, 1874, for five thousand eighty-three & $\frac{83}{100}$ dols.
" 781, " Nov. 16, 1874, " three thousand and fifty dollars.
" 782, " Nov. 20, 1874, " twenty-two hundred & ninety dols.
" 767, " Oct. 24, 1874, " forty-five hundred dollars.
" 816, " Feb'y 17, 1875, " two hundred dollars.
" 787, " Nov. 18, 1874, " fifty-four hundred seventy-four $\frac{58}{100}$ dols.
" 804, " Do. 28, 1874, " sixty-nine hundred eighty $\frac{62}{100}$ dols.
" 811, " Jan'y 11, 1875, " six thousand dollars.
" 796, " Do. 15, 1874, " sixty-four hundred seventy & $\frac{20}{100}$ dols.
" 814, " Jan'y 19, 1875, " thirty-six hundred eighteen & $\frac{61}{100}$ dols.
" 812, " Jan'y 14, 1875, " twenty-eight hundred fifteen $\frac{70}{100}$ dols.
" 815, " Jan'y 19, 1875, " ten thousand dollars.

Your petitioner further represents that, at the time of his appointment as such receiver, he received, among other property, said five locomotive-engines, and that they are now in his possession.

He further represents that said engines, on account of their peculiar construction, are not adapted to the business of said road, and that they cannot be economically used, and, also, that the said locomotive works still claim to be the owners of said locomotive-engines, under said contracts, and that the title thereto has never passed and become vested in said company.

78 The receiver therefore prays for authority to surrender said five locomotive-engines to the said "Hinchley Locomotive Works," and to adjust, settle, and pay for the use of said locomotives during and from the date of said receivership.

And your petitioner will ever pray, &c.

ADNA ANDERSON,
Receiver.

79 This memorandum of agreement between the Hinckley Locomotive Works, a corporation doing business in Boston, Mass., of the first part, and the Chicago, Danville & Vincennes Railroad Company, of the State of Illinois, of the second part, witnesseth:

Whereas the party of the first part has constructed for the party of the second part two (2) locomotive engines and tenders, numbered, respectively, 28 & 29, and shop numbers 1,188 & 1,187, and have received from said party of the second part its notes, as follows, to wit: One note, numbered 616, dated October 7, 1873, for six thousand ($6,000) dollars, payable in five months from its date; one note, numbered 617, dated October 7, 1873, for five thousand ($5,000) dollars, payable in five months from its date; one note, numbered 618, dated Oct. 7, 1873, for twenty-five hundred ($2,500) dollars, payable in five months from its date; one

note, numbered 619, dated Oct. 7, 1873, for three thousand ($3,000) dollars, payable in four months from its date; three notes, numbered, respectively, 620, 621, & 622, dated Oct. 7, 1873, each for two thousand ($2,000) dollars, payable in four months from their date; one note, numbered 623, dated Oct. 7, 1873, for fifteen hundred ($1,500) dollars, payable in four months from its date; and three notes numbered, respectively, 624, 625, & 626 each, for one thousand ($1,000) dollars, payable in four months from their date; all of which notes are dated at New York, and signed by W'm D. Judson, president, and countersigned by Amos Tenney, treasurer, and payable at the Marine National Bank in the city of New York. And whereas the party of the first part, without parting with its property in said locomotive engines and tenders, has allowed the party of the second part to take the same and put them in or upon its road:

Now it is expressly agreed that at the maturity of said notes the party of the second part shall have the privilege of renewing said notes for the additional time of four months; and at the expiration of said additional time the party of the second part shall have the privilege of again renewing said notes; the first three, i. e. Nos. 616, 617, 618, for an additional period of three months, and the other eight for a period of four months.

It is also agreed that the party of the second part shall pay to the said party of the first part, in cash, upon demand, interest upon the said notes and upon the said renewals, at whatever rates the party of the first part may have to pay in order to realize cash for the said notes and for the said renewals.

It is further expressly agreed that if the aforesaid notes shall be well and truly paid according to the terms thereof, and in accordance with the terms of this agreement, as above stated, then the party of the first part shall make a bill of sale of said locomotive engines and tenders to the party of the second part, and that the party of the first part shall permit the party of the second part to use said locomotive engines and tenders upon its road until default shall be made in the payment of any of said notes, or the interest thereon, as agreed, or until said party shall undertake to dispose of any of said locomotive engines or tenders, or until any of them shall be attached or taken by a third party, when the party of the first part shall have the right to retain possession of said locomotive engines and tenders, and to dispose of the same at public or private sale, and deducting out of the proceeds and retaining to its own use a sum of money equal to the amount of such of their notes as shall be outstanding and unpaid, and whatever interest may be due thereon and unpaid, together with the costs and expenses attending the sale, shall pay over the balance of net proceeds to the party of the second part.

In testimony whereof each of the said parties has caused its president to subscribe his name and affix its corporate seal hereto this eighth day of October, 1873.

[SEAL RAILROAD CO.] CHICAGO DANVILLE & VINCENNES RAILROAD COMPANY,
By W. D. JUDSON,
President.

[SEAL LOCOMOTIVE WORKS.] THE HINCKLEY LOCOMOTIVE WORKS,
By DANIEL F. CHILD,
President pro tem.

Witness:
GEO. F. CHILD

82 This memorandum of agreement between the Hinckley Locomotive Works, a corporation doing business in Boston, Mass., of the first part, and the Chicago, Danville and Vincennes Railroad Company, of Illinois, of the second part, witnesseth:

Whereas the party of the first part has constructed for the party of the second part three (3) locomotive engines and tenders, numbered, respectively, 25, 26, and 27, and shop numbers 1,178, 1,179, and 1,180, and has received from said party of the second part its notes as follows, to wit: One note, numbered 595, dated Aug. 23, 1875, for thirteen thousand five hundred ($13,500) dollars, payable in four months from its date; one note, numbered 576, dated Aug. 18, 1873, for thirteen thousand five hundred ($13,500) dollars, payable in five months from its date; and one note, numbered 577, dated Aug. 23, 1873, for thirteen thousand five hundred ($13,500) dollars, payable in five months from its date; all of which notes are dated at New York and signed by W'm D. Judson, president, and countersigned by Amos Tenney, treasurer, and payable at the Marine National Bank, in the city of New York; and whereas the party of the first part, without parting with its property in said locomotive engines and tenders, has allowed the party of the second part to take the same and put them in or upon its road.

And it is expressly agreed that, at the maturity of said notes, the party of the second part shall have the privilege of renewing the said notes for the additional term of four months, and at the expiration of said additional term the party of the second part shall have the
83 privilege of again renewing said notes, one of them for a further period of four months and the other two for a period of three months.

It is also agreed that the party of the second part shall pay to the said party of the first part, in cash, upon demand, interest upon the said notes, and upon the said renewals, at whatever rates the party of the first part may have to pay, in order to realize cash for the said notes, and for the said renewals. It is further expressly agreed that if the aforesaid notes shall be well and truly paid, according to the *the* tenor thereof, and in accordance with the terms of this agreement, as above stated, then the party of the first part shall make a bill of sale of said locomotive engines and tenders to the party of the second part, and that the party of the first part shall permit the party of the second part to use said locomotive engines and tenders upon its road until default shall be made in the payment of any of said notes, or the interest thereon, as agreed, or until said party shall undertake to dispose of any of said locomotive engines or tenders, or until any of them shall be attached or taken by a third party, when the party of the first part shall have the right to retain possession of said locomotive engines and tenders, and to dispose of the same at public or private sale, and deducting out of the proceeds and retaining to its own use a sum of money equal to the amount of such of their notes as shall be outstanding and unpaid, and whatever interest may be due thereon and unpaid, together with the costs and expenses attending the sale, shall pay over the balance of net proceeds to the party of the second part.

In testimony whereof each of said parties has caused its pres-
84 ident to subscribe his name and affix its corporate seal hereto, this first day of September, 1873.

CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY,
[SEAL OF RAILROAD CO.] By W. D. JUDSON,
Witness: *President.*
G. A. BORLAND.

HINCKLEY LOCOMOTIVE WORKS,
[SEAL OF LOCOMOTIVE WORKS.] By DANIEL F. CHILD,
Witness: *Pres't pro tem.*
GEO. F. CHILD,
F. L. BULLARD.

(Endorsed:) Filed Oct. 8, 1875. W'm H. Bradley, clerk.

85 And on the same day, to wit, the 8th day of October, A. D. 1875, in the record of the proceedings of said court in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

WILLIAM R. FOSDICK AND JAMES D. FISH
vs.
CHICAGO, DANVILLE AND VINCENNES RAILroad Company et al. } In chancery.

On reading the petition of Adna Anderson, receiver, filed in the above-entitled cause, praying for authority to surrender to the Hinckley Locomotive Works five locomotive engines held by him as such receiver under contracts entered into by and between the said Chicago, Danville and Vincennes Railroad Company and the said locomotive works, copies of which are attached to said petition, it is ordered that the said receiver have authority to surrender the said five locomotive engines named and described in said petition to the said Hinckley Locomotive Works, taking the proper receipt therefor.

And the said receiver is authorized to settle with and pay to the said Locomotive Works for the use of said engines during the time he has been such receiver.

86 And in case of such surrender, the said receiver is ordered to receive from the said locomotive works the promissory notes of said railroad company given for said locomotive engines now outstanding and unpaid, and deposit the same with the clerk of this court, to be held subject to such further order as the court may hereafter make in the premises.

87 And afterwards, to wit, on the 23rd day of October, A. D. 1875, the said Chicago, Danville and Vincennes Railroad Company, by its solicitor, filed in said clerk's office its answer and demurrer to said amended bill in said entitled cause, which said answer and demurrer are in the words and figures following, to wit:

Amended bill.

In the circuit court of the United States, northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH, complainants,
vs.
CHICAGO, DANVILLE AND VINCENNES RAILroad Company, James W. Elwell, and R. Biddle Roberts, defendants.
} In chancery.

The separate answer of the Chicago, Danville and Vincennes Railroad Company, one of the defendants, to the amended bill of complaint of William R. Fosdick and James D. Fish, complainants.

This defendant now, and at all times hereafter, reserving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors and uncertainties and imperfections in the said amended bill of complaint contained, for
88 answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer thereto, answering saith:

Respondent admits that it is a corporation organized and existing under and by virtue of the laws of the State of Illinois, and was so organized under an act of the general assembly of said State, entitled "An act to incorporate the Chicago, Danville, and Vincennes Railroad Company," approved February 16th, A. D. 1865, and has been engaged since that time in business, by virtue of said act, at and within the northern district of Illinois; that by its charter it was authorized and empowered to locate, construct, build, maintain, and operate a railroad from a point in Lawrence County, on the Wabash River, opposite Vincennes, in the State of Indiana, upon the most eligible route to Chicago, as alleged in said amended bill of complaint; also to unite and consolidate its railroad, stock, and property with any other railroad company or companies in this or any other State, whose line or lines of road should cross or intersect respondent's road, or that should be built along or upon the line thereof, upon such terms as should be mutually agreed upon, and was empowered to execute contracts to perfect such consolidation.

89 Admits that in and by said charter it was authorized to borrow money on its credit, not exceeding its authorized capital stock, at a rate of interest not exceeding ten per centum per annum, payable semi-annually, and to execute bonds therefor with interest coupons annexed, securing the payment of the same by a mortgage or deed of trust upon the whole or any part of its road and income then existing, or to be afterwards acquired.

Admits that its directors were authorized to negotiate and sell said bonds in the manner alleged in said amended bill of complaint.

Admits that prior to March 10th, A. D. 1869, its capital stock was $2,500,000, and that thereafter, and on said 10th day of March, A. D. 1869, it caused 2,500 bonds to be issued, duly executed, numbered from 1 to 2,500 inclusive, each in the sum of $1,000, payable in gold coin on April 1st, A. D. 1909, with interest at seven per cent. in gold, payable semi-annually, on the first days of April and October in each year, on delivery of said coupons in the city of New York, at a place designated by said respondent, and also admits that Exhibit A of the original bill herein is a copy of one of said bonds, with coupon attached.

The respondent further admits that, for the purpose of securing said 2,500 bonds, and the interest coupons thereto attached, it executed
90 and delivered to complainants, as trustees, a mortgage or deed of trust, conveying to them for the benefit of holders of such bonds, all of its said railroad, extending from the city of Chicago, in Cook County, Illinois, through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, and thence southeasterly to a point on the State line of Indiana, and all its franchises, equipments, property, tolls, rents, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods and chattels, connected with or used in the using or operating of its said railroad, or appertaining thereto, and all its rails, ties, fuel, fences, right of way, and easements, and all cars, engines, tools, all rents, reservations, and reversions of every nature, including all property which said respondent then owned or might thereafter acquire between said terminal points.

Also admits that Exhibit B, attached to the original bill, is a copy of said mortgage; also that said mortgage, on said 10th day of March, A. D. 1869, was duly executed and delivered to said trustees, and the trust by them accepted. Also that said mortgage, during said month of March, A. D. 1869, was duly recorded in all the counties heretofore named, and became a first lien upon the property of this respondent, according to the conditions thereof.

91 Your respondent further admits that all of said bonds were certified by said trustees, and that they were thereafter sold by respondent; that they are now outstanding, and a valid lien against this respondent.

Respondent further admits that it consolidated, March 4th, A. D. 1872, with the Rossville and Indiana Railroad Company, such consolidation taking the name of this respondent, and that Exhibit D, of the original bill, is a copy of such articles of consolidation.

Respondent further admits that, on March 9th, A. D. 1872, it consolidated with the Western Indiana Railroad Company, such consolidation taking the name of this respondent, and that Exhibit D, of the original bill, is a copy of such articles of consolidation.

Further admits that said Western Indiana Railroad Company was, prior to said last-named consolidation, a corporation of the State of Indiana, and that this respondent, by virtue of said consolidation, became and was a corporation of the said State of Indiana, as well as a corporation of the State of Illinois; and, further, that this respondent became and was vested with lawful power under the laws of said State of Indiana to locate, construct, and operate a continuous line of railway, extending from the boundary-line between the States of Indiana and Illinois, at a point and through the counties named in said complainant's amended bill of complaint.

92 Your respondent further admits, that on the 12th day of March, A. D. 1872, for the purpose of providing means for the construction and equipment of said line of road in Indiana, it caused bonds to be executed to the amount of $1,500,000, being 1,500 bonds in $1,000 each, payable 40 years after date, with interest payable and numbered respectively, as alleged in said amended of complaint.

Respondent further admits, that to secure said last named bonds, and coupons thereto annexed, it executed and delivered to complainants, on said March 12th, A. D. 1872, its certain mortgage or trust-deed, conveying to said trustees, respondents' entire length of road in Indiana, described in complainants' said amended bill of complaint, and also all such additional branch roads as respondent might thereafter construct

in extending its track into the coal and mining regions in the vicinity of said main line of road, with all its franchises, equipments, property, tolls, issues and profits, and all its lands, tenements, buildings, fixtures, machinery, goods and chattels, connected with or used in operating said line of road, and all its rails, ties, fuel, fencing and erections, easements, cars, engines, tools, and all rents, reservations and reversions of every kind; that Exhibit F is substantially a copy of said mortgage.

93 Further admits that afterwards, to wit, on said 12th day of March, A. D. 1872, said mortgage was delivered to complainants as trustees: and said respondent believes that complainants accepted the trust thereby created and entered upon the performance of their duties, and duly certified all of the said bonds so issued.

Respondent further admits that said bonds were disposed of in the manner alleged in said amended bill of complaint, and are now outstanding and valid obligations of this respondent. Further, that said mortgage was, during said month of March, A. D. 1872, duly recorded in Warren, Fountain, Park, and Clay Counties, in the State of Indiana, and became a first lien upon all the property and franchises of respondent within said counties.

Your respondent, further answering, admits that it did, by its proper officers, on the 24th day of April, A. D. 1872, execute a further or so-called consolidated mortgage, for the purposes stated in said mortgage, a copy of which is filed with said amended bill of complaint, as Exhibit G; and respondent avers that by the terms of said mortgage it is provided, and the right to said corporation given, to execute a still further mortgage for the purpose of providing means, whenever necessary, for the purchase of additional rolling stock and equipment for the

94 use of its said railroad, which should have a priority of lien to the said mortgage of April 24th, 1872. That the necessity of such additional equipment became apparent to the officers of said corporation in the summer of 1872, and it was then determined to issue the so-called convertible mortgage which was afterwards executed by said company.

For this reason said mortgage of the 24th of April, 1872, was never recorded in any of the counties upon the line of either division of said company's road, and did not become, and is not, a lien upon any of the property of this respondent.

Respondent further admits that on May 6th, A. D. 1872, it consolidated with the Attica and Terre Haute Railroad Company, and that these two corporations became a consolidated corporation by the name and style of this respondent. Exhibit E of original bill herein is substantially a copy of such articles of consolidation.

Admits, further, that it proceeded with the construction of its line of railroad in the States of Indiana and Illinois, and has constructed and put in operation a large portion thereof, and that said line of road in Illinois commences at Dalton, 20 miles south of Chicago, and runs southerly to Danville, in Vermillion County, a distance of about 108 miles, with a branch from Bismark, in said Vermillion County, to the east line of said State, a distance of about 7 miles, making a total of about 115 miles.

95 Admits that it runs its cars over the line of the Chicago and Southern Railroad from a point near Dalton into Chicago; also, that it uses a portion of the line of the Pittsburgh, Cincinnati and St Louis Railway Company near and within Chicago; and that it has side tracks of its own in said city.

Respondent further admits that in Indiana it has constructed and completed main line of about 18 miles, and about 5 miles of branch road; from Snoddy's Mills to Montezuma, a distance of about 18 miles, the right of way has been procured, and about twenty per cent. of the grading finished; from Montezuma to Brazil Coalfields, about 25 miles, the right of way has been procured, and 85 per cent. of the grading done, all the bridging and about 2 miles of track laid. That respondent's road in Indiana is known as the Indiana Division, and its road in Illinois as the Illinois Division.

Admits that it paid all coupons maturing upon said bonds and each of them, up to and including the one maturing April 1, 1873.

Respondent, further answering, says that true it is, that subsequent to October 1st, A. D. 1873, the holders of said 4,000 bonds to the amount of $2,801,000 thereof placed in the hands of William R. Fosdick, one of the complainants herein, the coupons on said bonds maturing
96 October 1st, 1873, April 1st and October 1st, 1874, and April 1st, 1875, and that each of said holders received from respondent a certificate of indebtedness for the amounts of said coupons so placed in the hands of said Fosdick, and which said certificates were each payable on April 1st, 1879, with interest from and after February 1st, 1874, at seven per cent. per annum, payable semi-annually, on the first days of February and August, respectively, in each year, at the office or agency of said respondent in the city of New York, upon the delivery of the interest-warrants annexed to said certificates, both principal and interest payable in gold.

That true it is, that in said certificates respondent agreed, amongst other things, that in case of non-payment thereon on demand when due, or in case of the non-payment of the coupons maturing October 1st, 1875, thereafter until payment of said certificates on maturity, the holder thereof should be entitled to demand and receive from said Fosdick the interest coupons described in said certificates, and with all his rights to proceed against this respondent. Exhibit H is a copy of one of said certificates.

And said respondent further answering says that the interest-warrants upon said funding certificates maturing August 1, 1874, were paid
97 by said company when presented for payment, and that all of said coupons have been paid.

That as to such interest warrants maturing February 1st, 1875, there remains unpaid only the sum of $3,167$\frac{77}{100}$, all the other of said coupons having been paid by said respondent.

And the respondent says that said balance of said interest-warrants then remaining unpaid, to wit, the sum of $3,167$\frac{77}{100}$, would have been paid and canceled by this respondent, had they been presented for payment at maturity, and that this respondent is not and should not be held responsible for such apparent default.

Said respondent says that on the 22d day of February, A. D. 1875, one Stephen Osgood, without any notice whatever to this respondent, upon his ex parte application to the judge of the circuit court of Will County, in the said State of Illinois, wrongfully and fraudulently procured the appointment of receivers of all the property, assets and income of the said respondent within the State of Illinois, and that such receivers forcibly took possession of the offices and all the property of said respondent on said 22d day of February, and by the aid of writs of assistance, and other process issued by said court or the judge thereof, held the posses sion of all said property of this respondent, its earnings and in
98 come, until the first day of June, 1875, at which time said receiv-

ers were removed by the order of this honorable court, and a receiver of all such property appointed under the prayer of the complainants in the said original bill of complaint contained.

And this respondent says that on said 22d day of February it was not in default in the payment of any of said certificate-warrants that matured February 1st, 1875; that all of said warrants were paid as presented to this respondent prior to said 22d day of February; and that such balance of $3,167\frac{77}{100}$ was not paid for the reason that the action of said State court had deprived this respondent of the power to meet such payments. But the said respondent denies that said corporation was on said first day of February, 1875, insolvent and unable to meet the payment of said certificate-warrants, as charged in said amended bill of complaint, but on the contrary avers and charges that at all times after the maturity of said interest, and until said 22d day of February, said respondent had the pecuniary ability and was ready and willing to pay all such interest, and did in fact pay all such interest warrants when presented.

And the said respondent further says and charges the fact to
99 be that the net earnings of said company, during the year 1874, and the months of January, February, April, and May of the present year, were more than sufficient to pay all the interest accruing upon the bonds issued under the trust-deed to the complainants; and also the interest upon said certificates of indebtedness, and upon all other mortgage-bonds that had been negotiated and sold by said respondent.

And the said respondent says that the said company is not in default in the payment of any certificate interest-coupons, after proper demand, and that therefore none of the holders of said certificates are lawfully entitled to the return from the said Fosdick, special trustee as aforesaid, of the bond-interest warrants so funded and deposited with the said Fosdick.

Your respondent admits that the contracts for funding said interest-warrants are substantially set forth in said complainants' amended bill, and that the holders of about four-fifths of the said 4,000 first-mortgage bonds then, and about three-fourths of all now, outstanding entered into said agreement, and so funded their said interest-warrants.

Your respondent, further answering, admits the issue of a so-called convertible bond by said corporation, bearing date the first day
100 of January, A. D. 1873, to the amount of one million dollars, which said bonds were secured by a deed of trust, dated the 16th day of December, A. D. 1872, by which the said company conveyed to the said James D. Fish and James W. Elwell, as trustees, all its property, rights, and franchises in the States of Indiana and Illinois, subject, however, to the prior liens created by the trust-deeds of March 10th, A. D. 1869, and of March 12th, A. D. 1872, all of which said bonds, amounting in the aggregate to one million dollars, have either been sold or hypothecated by said company.

Your respondent also admits the resignation of the said James D. Fish of his said trust, and that the said Elwell is now sole trustee under said deed of trust.

Your respondent, further answering, denies that said mortgage of Dece nber 16th, A. D. 1872, creates a third lien upon the property of said corporation. It admits that the trust-deed of March 12th, A. D. 1872, is a first and prior lien upon all the property of said respondent situate within the State of Indiana, and that the lien created by the trust-deed of March 10th, A. D. 1869, is a first and prior lien upon all

the property described therein, that is to say, all the property, rights, and franchises of said company embraced within the terminal points of the road it was authorized by its charter to construct and neces-
101 sary to the management and operation of said road, but said respondent avers that all other property, rights, and franchises of every kind and character belonging to said company, or thereafter to be acquired, is, by the terms of said trust-deed, expressly reserved from the lien thereby created; and respondent says that prior to the first day of January, 1873, it did, under authority conferred by its charter, construct a branch road from Bismark, a station on its main line, in the said county of Vermillion, in a southeasterly direction to the west line of the State of Indiana, a distance of about seven miles, upon which said branch road said mortgage of December 16th, A. D. 1872, is a first and only lien.

And your respondent, further answering, says that it is not true, as stated in said amended bill of complaint, that at the time of the filing of the original bill herein a large number of judgments had been obtained against this respondent, nor had a large amount of its property been levied upon to satisfy said judgments, but, on the contrary, respondent says that on the said 27th day of February, A. D. 1875, to the best of respondent's knowledge and belief, there was not in the hands of any officer of any court any execution against this respondent, and there were only two or three judgments unappealed from against the respondent, and your respondent avers, as to those, satisfactory arrangements had been made for their gradual payment.

102 Respondent admits that on said 22d day of February a part of its property in the State of Indiana was held by a writ of attachment, but the said respondent avers, and charges the fact to be, that said writ was issued on the 19th day of said month of February, in a suit then commenced in Warren County, Indiana, on pretended claims and demands against your respondent, but upon which it was in no manner liable; and respondent says, to the best of his knowledge and belief, said suit in Indiana was instituted for the purpose of aiding the said Osgood in his fraudulent action of placing the property of respondents in the hands of receivers, nominated by and in the interest of himself, and of those combining and confederating with him. That after such appointment had been made, said attachment suit and proceedings were dismissed without any trial or hearing whatever.

And the said respondent, further answering, says that it admits that it has a large outstanding and unsecured indebtedness, principally created in the purchase of rolling-stock and equipment for the use of said company; but respondent submits to this honorable court that the fact of such indebtedness does not authorize the foreclosure of said trust mortgage nor justify the appointment of a receiver of the prop-
103 erty of this respondent, nor has there been any default in the payment of interest as will authorize the seizure of said property and income as claimed by said amended bill of complaint.

Your respondent, further answering, admits that said company, by its proper officer, did, on the 12th day of January, A. D. 1875, make, execute, and deliver to the defendant, R. Biddle Roberts, a chattel-mortgage, whereby said company conveyed to the said Roberts, as trustee, the personal property therein named to secure the payment of certain bonds to be issued by said company, amounting in the aggregate to the sum of one million dollars; that said mortgage was executed by authority of the board of directors of said company, and in pursu-

ance of a resolution of said board adopted on the day of December, A. D. 1874.

And your respondent avers that said mortgage was not intended to, and did not in fact, affect the securities or equities of the complainants, or of any other bond-creditors of said company, but that said bonds were designed to be used only to "settle, pay, or secure any portion of the then existing indebtedness of said company," as expressed in said resolution, and that said bonds have been used for such purposes and no other.

Your respondent, further answering, says that it has no knowl-
104 edge, information, or belief of the number of said bondholders under said deeds of trust that have made demand upon said complainants that they should execute their said trust; but respondent says that said company is not, and was not at the commencement of this action, in default to one-half of such interest, and therefore respondent says that said bondholders had no right to make such demand, and neither were the complainants nor respondents required to accede to such demands by the terms of said trust-deed.

And the said respondent, further answering, says that it has no means of knowledge of the per cent. of the holders of said interest-warrants that matured October 1st, 1873, that presented such warrants to the company, and demanded payment thereof; but respondent says, if it is true, as charged, that at least ninety per cent. made such demand, at least eighty per cent. of the entire number afterwards waived such payment, and consented to an extension thereof, as hereinbefore stated, and that as to such eighty per cent. said company is in no default whatever.

And as to the holders of said six hundred and ninety-eight of said bonds, who did not fund their interest, the said respondent says, upon information and belief, and so charges, that a large majority thereof have consented to such default in the payment of said interest,
105 and have assented to such extension; that many of the holders of such bonds have expressed to the officers of said company their assent to such extension, and promised and agreed (but not in writing) that they would in no manner interfere with, or, by their adverse action, defeat the plans of said company for the extension of payment of said interest.

And respondent further says that it has no knowledge that any holder of said bonds ever elected to declare the principal due on account of the default of said company, with the exception of the said Osgood, who only claimed to hold nine of said bonds. And as to the said Osgood the respondent says that, to the best of its knowledge and belief, the said Osgood never has, nor has any one at his request ever demanded of said company, or of any of its officers or agents, payment of any of the coupons attached to any of the nine bonds of which he claims to be the owner, and that the only notice the respondent has ever had that the said Osgood had so elected, or that he demanded payment of either principal or interest was derived from his said bill of complaint, filed in said circuit court of Will County, as aforesaid, on said 22d day of February.

And the said respondent further avers that on the 23d day of Feb-
ruary, 1875, the said defendant offered and tendered the attorney
106 of record of said Osgood, in open court in said county of Will, full payment, principal and interest, of all the bonds held by the said Osgood, which was refused by said attorney, and that respondent at the same time offered to deposit in court the full amount of said

principal and interest, upon condition that said receivers should be discharged and said property restored to said respondent, which offer was refused by the said court.

And the respondent further charges that until the different holders of said bonds had been advised of the action of said court, and said respondent had been unlawfully dispossessed of its property, no one of said bondholders had demanded of the complainants that they should demand the possession of said property of this respondent, or that they should in any manner interfere with its control, and the respondent states upon information that the only demand then made upon said complainants was that they should, as such trustees, protect and preserve such property from such unlawful conversion.

And respondent says that it has never received from the complainants, as trustees, notice that they had declared the principal of said bonds due and payable, and says that no demand of payment of such principal has ever been made upon this respondent.

And said respondent, further answering, denies that said com-
107 plainants have ever been requested in writing or otherwise by the holders of a majority of said bonds, to proceed to collect, either principal or interest of said bonds, by foreclosure of said trust mortgage or sale of said property or in any other manner.

And the said respondent says that as to the holders of said eight hundred and one bonds, the coupons of which have been funded as aforesaid, they and each of them are estopped from making any present demand upon said trustees, to foreclose said trust mortgage and from prosecuting any present suit for such foreclosure either in their own names as complainants or in the names of such trustees.

And the said respondent, further answering, neither admits nor denies that said Indiana division of respondents' road is insufficient to secure the payment of the said Indiana division bonds, and humbly submits to this honorable court that such allegation is wholly immaterial to the issues herein presented.

And your respondent admits that the value of its said Illinois division of road greatly exceeds the amount of bonds issued under and secured by said mortgage of March 10th, A. D. 1869, and charges the fact to be that the net income derived from said Illinois division is greatly in excess of the current interest upon all of said bonds.

108 And your respondent denies that there is any other matter, cause, or thing in the said complainants' said amended bill of complaint contained, material or necessary for this defendant to make answer to, which is not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

CHICAGO, DANVILLE AND VINCENNES RAILROAD CO.,
By W. D. JUDSON, *President.*

E. WALKER,
Solicitor.

109 *Amended bill.*

In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH
vs.
CHICAGO, DANVILLE AND VINCENNES RAILroad Company et al. } In chancery.

The demurrer of the Chicago, Danville and Vincennes Railroad Company to the amended bill of complaint of William R. Fosdick and James D. Fish, complainants.

This defendant by protestation not confessing or acknowledging all or any of the matters and things in the said amended bill of complaint, to be true in such manner and form as the same are therein and thereby set forth and alleged, as to so much of said amended bill of complaint, and on the eleventh page thereof as charges that it will be impossible for said company to fulfill the conditions of said funding agreements, and that the holders of said certificates have the right to rescind said agreements; and to so much of the said amended bill, and on said page thereof as charges that the principal of said bonds has become due and payable, this defendant doth demur thereto, and for cause of demurrer showeth that the said complainants have not by their said amended
110 bill, made such a case as entitles them, in a court of equity, to any relief from or against this defendant as to the matters hereinbefore specified or any of such matters.

Wherefore, and for divers other good causes of demurrer in the said amended bill contained, or to so much of the complainants' said amended bill as before is set forth, this defendant doth demur, and prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to such part of the said amended bill as is so demurred unto as aforesaid.

I certify that in my opinion the foregoing demurrer of the Chicago, Danville and Vincennes Railroad Company, defendant, to the amended bill of complaint of William R. Fosdick and James D. Fish, complainants, is well founded in law, and proper to be filed in the above cause.

E. WALKER,
Solicitor and of Counsel for Defendant.

111 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Edwin Walker, being duly sworn, does depose and say that he is the attorney of the Chicago, Danville and Vincennes Railroad Company, the defendant named in the foregoing demurrer, and duly authorized and empowered as such attorney to make this affidavit in its behalf.

He further swears that he has read the foregoing demurrer to the amended bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

EDWIN WALKER.

Subscribed & sworn to before me Oct. 23, 1875.

E. A. DRUMMOND,
U. S. Com.

(Endorsed:) Filed Oct. 23d, 1875. W'm H. Bradley, cl'k.

112 Afterwards, to wit, on the 25th day of October, A. D. 1875, the Hinkley Locomotive Works, by its solicitor, filed in said clerk's office its petition in said entitled cause, which said petition is in the words and figures following, to wit:

Petition of Hinkley Locomotive Works.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK ET AL.
vs.
THE CHICAGO, DANVILLE AND VINCENNES *Railroad Company.* } In chancery.

To the honorable the judges of the United States circuit court for the northern district of Illinois, in chancery sitting:

The petition of the Hinkley Locomotive Works, a corporation doing business in Boston, Massachusetts, respectfully represents, that on the eighth day of October, A. D. 1875, a petition was presented to this honorable court by Adna Anderson, the receiver, praying for authority to surrender to the said Hinkley Locomotive Works five locomotive engines held by him as said receiver under certain contracts en-
113 tered into by and between the said Chicago, Danville and Vincennes Railroad Company and the said Hinkley Locomotive Works, copies of which contracts are attached to said petition, and are now on file in this cause, which said locomotives have been so surrendered to your petitioners, and the notes held by them of the said Chicago, Danville and Vincennes Railroad Company unpaid and protested, deposited with the clerk of this court as required by said order.

Your petitioners therefore pray that the said contracts and notes be referred to the master in chancery of this court, to ascertain the balance due your petitioners from the said road, and that the said master be directed to hear the testimony in relation thereto, and to ascertain the balance due under such contracts from the said company to your petitioners.

HENRY L. LEACH,
General Manager of the Hinkley Locomotive Works.

(Endorsed:) Rec'd Oct. 25th, 1875. W'm H. Bradley, cl'k.

114 On the same day, to wit, the 25th day of October, A. D. 1875, in the record of the proceedings of said court in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

WILLIAM R. FOSDICK ET AL.
vs.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company et al. } In chancery.

And now on this day the petition of the Hinkley Locomotive Works having been presented and considered, it is hereby ordered that the

said petition, together with the petition of Adna Anderson, the receiver, with the accompanying copies of contracts and the order made thereon by this court, October eighth, A. D. 1875, together with the notes of the Chicago, Danville and Vincennes Railroad Company, deposited with the clerk of this court in pursuance of said order, be referred to Henry W. Bishop, esq., the master in chancery of this court, with directions to hear the proofs and allegations of the parties to said contracts, and fix and determine the balance still due the Hinkley Locomotive Works, and for which the said road is liable by virtue of said contracts
115 under the terms thereof, and that he do make report herein at an early day.

116 Afterwards, to wit, on the 6th day of January, A. D. 1876, in the record of the proceedings of said court in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

WILLIAM R. FOSDICK ET AL.
vs.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company et al. } In chancery.

On motion, leave is given Stephen Osgood et al. to file petition herein without prejudice, and the same being now filed, it is ordered by the court that the same be referred to Henry W. Bishop, esq., master in chancery, of this court, to take proofs thereon and report the same to the court.

117 On the same day, to wit, on the 6th day of January, A. D. 1876, Stephen Osgood, Frederick W. Huidekoper, Thomas W. Shannon, John M. Dennison, George W. Gill, Alanson A. Sumner, Chandler Robbins, and William T. Hickok, filed in said clerk's office their intervening petition in said entitled cause, which said petition is in the words and figures following, to wit:

Intervening petition of Stephen Osgood et al.

18 Circuit court of the United States, northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH
v.
THE CHICAGO, DANVILLE & VINCENNES Railroad Company, and others. } In chancery.

Your petitioners, Stephen Osgood, Frederick W. Huidekoper, Thomas W. Shannon, John M. Dennison, George W. Gill, Alanson A. Sumner, Chandler Robbins, and William T. Hickok, respectfully show unto the court that they are the owners and holders of a large amount of the bonds and coupons issued by the defendant, the Chicago, Danville & Vincennes Railroad Company, the payment of which is secured by the execution and delivery of the trust deed or mortgage, dated March 10, 1869, and the supplementary trust deed or mortgage dated April 24th, 1872, both which trust deeds were duly executed, acknowledged, and delivered unto the said original complainants herein, William R. Fosdick and James D. Fish, as trustees, for the use, benefit, and behoof of your petitioners and all other bondholders of said issue of bonds.

And your petitioners further show that on the 27th day of February, 1875, the complainants filed their bill of complaint herein, alleging that in divers respects the conditions of said trust deeds had been broken by the said railroad company, and that it had forfeited all and singular its title and estate in said mortgaged property, and that the said
119 corporation was insolvent, and praying that the said mortgage should be foreclosed and the property therein specified should be sold, under the orders of this court, to satisfy the principal and interest of the bonds issued under said mortgage, and that an account should be taken of the amount due on such securities.

And afterwards, to wit, on the day and year last aforesaid, the said Chicago, Danville & Vincennes Railroad Company duly entered its appearance to said action, and submitted itself to the jurisdiction of this court.

And afterwards, to wit, on the 14th day of September, 1875, the said complainants duly filed in this court their amended bill, praying the same relief as aforesaid, and the said railroad company hath filed its answer to said amended bill.

And these petitioners pray reference to the said original and amended bill of complaint and unto the said answer to said amended bill of complaint, as the same now remain upon the files of the court; and these petitioners aver that all and singular the statements and allegations of said amended bill of complaint touching the execution, delivery, and record of said trust mortgages, the non-payment of interest upon such bonds, the insolvency of said railroad company, and the breach of condition of said mortgages, are true as they are set out in said amended bill of complaint, and these petitioners pray the benefit of all and singular such allegations, to the same extent as though they had again specifically set them out at length in this petition.

And your petitioners also show that this court, upon the prayer of the said bill, appointed a receiver of all and singular the property of said railroad corporation, and has been and still is administering the property thereof so within its jurisdiction for the benefit of the creditors thereof, according to their several priorities.

And your petitioners show that the said line of railroad constructed and operated by the said corporation in the State of Illinois and Indiana has always been managed as one property, and the equipment has been used promiscuously over and upon each part of said road, and no separate accounts have been kept and preserved of the exact earnings, receipts, or operating expenditures on each division of said line, and that the entire first mortgage bonded debt of said corporation is
$4,000,000, which bears interest at and upon the rate of 7 per
120 centum per annum, payable in gold coin, on the 1st days of April and October; that each such interest installment amounted to the sum of $140,000 gold, and the said corporation has not paid any portion of the coupons falling due Oct. 1, 1873, April 1, 1874, Oct. 1, 1874, and April 1, 1875, and has not been in the receipts of earnings, or funds from any source, to enable it to satisfy any portion of the principal of such four coupons.

And your petitioners show that on the first day of October, 1873, the said railroad corporation defaulted in the payment of interest on its bonds as aforesaid, and that large numbers of the coupons maturing on said day were presented at the office of the corporation, in the city of New York, and payment thereof duly demanded, and payment thereof was refused for want of funds, and the said corporation, by its board of directors, passed and recorded a resolve and published circulars to

the bondholders, announcing the inability of said corporation to pay any portion of said current coupon falling due Oct. 1, '73, and also the three succeeding interest warrants due in April and October, 1874, and April, 1875.

And being so in default, and having broken the condition of said mortgages, the said railroad corporation, by its then board of directors, published a circular asking indulgence from its bondholders on the statements and conditions stated in the said original and amended bill herein, viz, that the said four coupons on the bonds were to be deposited in trust with a special trustee, and certificates to be issued for the principal thereof, payable February 1, 1879, with interest at 7 per cent., with the distinct agreement that in case of the non-payment of the interest on any such certificate on demand at any time when due, or in case of the non-payment of the coupons of the first mortgage bonds due October 1, 1875, and on the first days of April and October in each succeeding year until said February 1, 1879; that the holder of said certificate should be entitled to surrender such certificate and receive and proceed against the corporation upon such original interest warrants deposited with the trustee; a copy of such circular and form of certificate is hereunto annexed and reference prayed thereto.

And your petitioners show that the statements of the said corporation and its officers presenting such funding scheme to the bond-cred-
121 itors, were false and fraudulent, and largely concealed, and understated the indebtedness and concealed the embarrassed and insolvent condition of the corporation, and, also, that said Fosdick and Fish were cognizant of such statements and the nature thereof, and at the request of the corporation assisted in circulating the same among and procuring the assent of the bond creditors and were compensated therefor.

And relying upon the said statements, the holders of $409,000 out of said $560,000 principal of said four coupons, consented to such funding arrangement, but the holders of the remainder thereof never at any time consented to any extension of time, or in any manner agreed or barred themselves from proceeding against said corporation by reason of such original default, and your petitioner Osgood never at any time funded, or agreed to fund, any of the coupons on his said bonds.

And your petitioners show that the said Chicago, Danville and Vincennes Railroad Company was not at and before August 1, 1875, in such financial condition that it could pay the interest due upon the said scrip certificates, but the said corporation was then, and ever since has been, insolvent, and it did not pay or cause to paid the said interest upon such scrip certificates, and as shown by the report of the receiver of this court, the entire cash on hand on August 1, 1875, belonging to said corporation was only $426.03 in currency, with the pay-rolls and supply-bills from the previous month to be paid therefrom.

And your petitioners further show that the said railroad corporation became and was wholly insolvent at and before October 1, 1875, and that on that day it did not pay, or cause to be paid, the sum of $140,000, gold coin of the United States, due for interest upon the said first mortgage indebtedness of $4,000,000 in gold, although large numbers of such coupons were presented for payment at the said company's agency in New York, and payment demanded and refused, and in truth and fact the entire cash in hands of the receiver belonging to said corporation at said October 1, 1875, and available for such interest payment would not exceed about one-tenth part of what was then and there due for such interest installment, and for the want of such funds, the said $140,000

gold coin due October 1, 1875, from said railroad company, remains wholly unpaid and due unto your petitioners and others, the holders of said bonds, and by reason of such insolvency and default the said
122 funding scheme has become wholly inoperative and void as to those who accepted it solely upon the conditions as aforesaid, and by reason of such default in the payment of said interest warrant due October 1, 1875, and the insolvency of said corporation, all such persons who consented to the extension of payment until 1879 of said four previous coupons, are now in equity, and according to such trust, entitled to enforce the same against said company in all respects as though the said funding agreement had never been by them assented to, and very many of the said bondholders who had been induced to accept such scrip certificates have notified said trustee since October 1, 1875, that by reason of such default and insolvency, they claimed recourse upon their coupons held in trust by him and tendered back the said certificates.

And your petitioners claim that by reason of such default and insolvency the entire amount of said five coupons amounting to $700,000 in gold is now due for interest alone upon the said first mortgage liability of said corporation.

And your petitioners further show that demand was also made at the office of said corporation in New York in December, 1874, for the payment of sundry coupons due April 1, 1874, and which were never funded or agreed to be so, and that payment thereof was refused and the said presentment and non-payment was duly evidenced by a public instrument of protest by a notary public in and for said county and city of New York, and the said coupons still remain unpaid, and more than six months having expired since the demand of payment of said coupons in October, 1873, and the default thereon, and more than six months having also expired since the demand of payment of such coupons in December, 1874, and the default thereupon, your petitioners claim that, by the conditions of said conveyances, the said principal of all and singular the said bonds has also become due, and that there is now due and owing by the said corporation the full sum of $4,700,000 upon said first-mortgage indebtedness.

And your petitioners show that as to the said supplemental mortgage dated April 24, 1872, both the said James W. Elwell and James D. Fish, who were trustees in said later mortgage of January 1, 1873, were both directors of said corporation at both said dates, and when they accepted the trusts of said later conveyance, were both personally cognizant of the existence, terms and delivery of said conveyance of April 24,
123 1872, and had voted for its execution and delivery as directors of said railroad corporation.

And in that behalf your petitioners show that if said Fish has in fact ever resigned his trust under said mortgage of January 1, 1873, that such resignation was made after the institution of this action, and was colorably done under the advice of counsel so that he might be better able to maintain himself in his position as trustee in the said first mortgage as aforesaid, against the wishes of a majority of the bondholders.

And notwithstanding such resignation, the said Fish has a direct hostile interest against his cestui que trusts, for that the said Fish is now and for some time has been the president and a large stockholder in the Marine Bank of New York City, which said corporation has for about two years last past been a holder of $180,000 of such convertible bonds, and, therefore, directly and materially interested to defeat, delay, and lessen the security and recovery of your petitioners.

And your petitioners show that the capital stock of said railroad cor-

poration is limited by its charter to $5,000,000, and that prior to January 12, 1875, the said bonded debt authorized to be issued, and then outstanding, was the sum of $5,000,000, and that in and by the charter of the said corporation, its power of borrowing money on bond and mortgage is expressly limited to the amount of its authorized capital stock; and your petitioners further show that the said chattel mortgage and bonds of January 12, 1875, recited in the bill of complaint herein, were never authorized to be issued or executed by any vote of the stockholders as required by law, and that with the exception of $30,000 of said chattel-mortgage bonds now held as collateral by N. S. Bouton on a loan of $12,000, none of said chattel-mortgage bonds are held in good faith and for value and in the usual course of business, but that the same are held as follows: E. C. Bozart, $25,000, bonds; A. T. Chur, $31,000, bonds: Marine Bank of New York, $100,000, bonds; W. B. Stevens, $20,000, bonds; each and all such bonds being held as collateral security for debts existing prior to such issue and delivery of bonds, they being merely received as additional security and without any consideration paid at the time; and there are also others held by W. D. Judson and Amos Tenney, $624,000, bonds, $200,000 of which are claimed to
124. be held by them as collateral security for a certain mortgage by them previously executed, and $424,000 being claimed to be held as collateral security for their precedent endorsements of the notes of the said railroad company, and also $100,000, other of such bonds held by W. B. Stevens claimed to be held by him as collateral security for the benefit of the holders of convertible mortgage bonds then outstanding.

And your petitioners claim that as to the said bonds held by the said Marine Bank of New York, they were actually taken and received by the said Fish, as the officer thereof, or with his knowledge and consent after the filing of the bill herein, and that his interest in such $100,000, bonds, is hostile to the interest of your petitioners and all other bondholders; and your petitioners claim that the said chattel mortgage and bonds are, for the reasons aforesaid, illegal, fraudulent, and void, and do not constitute any valid or prior lien on any part of said property as against the liens of your petitioners.

And further in that behalf your petitioners show that in and by the mortgage of March 10, 1869, it is provided that the lien thereof shall attach to all property, real and personal, which the said corporation then owned or might thereafter acquire in law or equity, of any kind whatever, appurtenant to said railroad; and said corporation did further covenant that, to better secure and confirm the title of said trustees in and to all property which might thereafter be acquired by it, as appurtenant to said railroad, as it would, as often as it might be lawfully required by said trustees, make such further conveyances and assurances as might be necessary to better carry out the said trust; and notwithstanding such grants and covenants in said trust-mortgage, and that both said Fish and Fosdick were personally cognizant of the fact that the said corporation had acquired a large amount of equipment, engines, cars, and tools since the said delivery of said conveyance to them in 1869, they wholly failed, neglected, and refused to discharge their duties as trustees in that regard, or to demand or procure any conveyance or assurance whatever from the said mortgagor corporation, in order to more fully and completely vest in them, for the use of your petitioners and others, an indefeasible title to such after-acquired property, but, on the contrary thereof, the said Fish, as a director of said corporation, voted for the execution of said chattel-mortgage, directly against the

interests of such bondholders, and both said trustees have per-
125 mitted the said bonds to be disposed of and appropriated in the manner and upon the considerations and by the persons and corporations aforesaid, without attempting to prevent the same.

And your petitioners show that at the date when the said trust-mortgage of March 10, 1869, was executed and delivered, that the said covenant and condition thereof extending the lien thereof to after-acquired property, as a paramount and prior claim, was a valid continuing covenant, binding all equipment whenever acquired, and that, by the judgment of the court of highest resort in said State of Illinois, there had been a fixed rule of interpretation validating and effectuating such covenant, and your petitioners and others purchased their securities, relying upon the validity and interpretation of such covenant, and your petitioners therefore claim that no law of a date subsequent to such covenant and mortgage can in any manner be invoked or be operative to impair the lien and security of such contract with them, and that, for the reasons and upon the facts aforesaid, your petitioners and the other first-mortgage bondholders of said railroad company have a lien and claim upon all and singular the property of said corporation of every kind, real and personal, now in existence on the line of railroad, and the income therefrom, which is, in equity, prior and superior to the claim of any other creditors whatsoever, and they pray that the court will so find and decree.

And as to the claim and pretense of the said railroad corporation and its officers, that its net earnings have been and are sufficient to discharge and satisfy the interest upon the said bonded debt, and that for such reason a foreclosure will not be decreed, these petitioners aver that said pretense is wholly false, and in that behalf show to the court, that on October 1, 1875, there was due, for current interest on the first-mortgage bond debt of $4,000,000, an installment of $140,000 in gold, which had never been funded or agreed so to be; that the entire amount of cash on hand, held by the receiver, was only $27,766.66 in currency, with the previous month's bills, his own salary and divers rentals to be deducted therefrom and paid out of such balance.

And your petitioners would further show that prior to the default in interest on the bonded debt, on October 1, 1873, the said corporation stated that it owed a floating debt, as follows:

126	For loans on bonds	$396,000
	For engines and cars	254,000
	For supplies and labor, etc	156,000
	Or a total of only	$806,000

That since said date, though the corporation now claims it has been in receipt of large net earnings, it has not therefrom paid any interest on its first-mortgage bonds, but the unpaid and past-due interest on such prior debt has accumulated until it is now represented by five coupons of $140,000 each, or $700,000 gold, or about $798,000 currency, and in addition thereto the receiver officially reports to this court that the floating debt of said corporation, on June 1, 1875, was as follows:

On	operating account	$230,255 24
On	construction account	92,889 22
On	rolling-stock	377,307 40
On	money borrowed	435,606 80
Or a	total of	$1,136,058 66

showing an increase of floating liability since October 1, 1873, of $330,058.66, and adding to that sum the arrears of interest accrued during that period, as aforesaid, making an aggregate increase of indebtedness since October 1, 1873, of about $1,128,058.66, currency.

And these petitioners show that, in truth and fact, the said corporation defendant did not even pay the interest on its funding script due on August, 1874, and February, 1875, out of any net revenue earned by it, by the operations of its road, but that it was forced to raise the first installment by procuring the sale of certain Chicago and Southern Railroad Company's bonds, charged upon its books as being sold to it by J. E. Young & Co., and the last installment was paid out of money which it borrowed for the purpose, and for which the said corporation's paper is still outstanding.

And your petitioners show that said corporation is hopelessly insolvent, that it has no real or substantial interest in the property covered by said mortgages, and that the revenues and incomes actually derived from the operations of said road, as shown by its books and the receiver's reports and accounts, are entirely inadequate to satisfy the current
127 interest or the arrears of interest due to your petitioners and other bond-creditors, or even any considerable fraction thereof; and that although they are entitled to the prior claim upon all said property and its income, *that* they are not in fact in the receipt of any sums whatever upon their several demands, and the aggregate of their said debt is constantly and largely increasing; and your petitioners claim that it would be grossly inequitable to refuse, on the false pretense of their bankrupt debtor, to delay in ordering the sale of said mortgaged property so that they may be able to realize some portion of their demands.

Your petitioners, therefore, pray that the court will entertain this petition and will ascertain the facts thereof, and will speed this cause and direct an account to be forthwith taken of the sums due on such first mortgage to your petitioners and others, and will decree the payment thereof; and that such amount constitutes a first lien on all and singular the property, real and personal, of said corporation and its income in the hands of the receiver, and direct the sale thereof by the master of this court to satisfy the said sums so ascertained and adjudged to be due; and your petitioners pray for all further and other relief that may be necessary to secure the rights of themselves and all the first-mortgage bondholders of said corporation and as this court may be competent to award by reason of the premises.

STEPHEN OSGOOD,
F. W. HUIDEKOPER,
AND OTHERS,
Petitioners.

H. CRAWFORD,
J. E. MCDONALD,
Solicitors.

(Endorsed:) Filed Jan. 6, '76. W'm H. Bradley, cl'k.

128 Afterwards, to wit, on the 16th day of July, A. D. 1875, said Hinkley Locomotive Works, by its solicitor, filed in said clerk's office its intervening petition in said entitled cause, which said intervening petition is in the words and figures following, to wit:

Petition of Hinkley Locomotive Works.

Circuit court of the United States, northern district of Illinois.

WM R. FOSDICK AND JAMES D. FISH
v.
CHICAGO, DANVILLE AND VINCENNES RAILroad Company et al. } In chancery.

To the honorable the judges of said court in chancery sitting:

The petition of the Hinckley Locomotive Works respectfully represents unto your honors that your petitioner is a corporation created by the laws of the State of Massachusetts, and is engaged in the manufacture and sale of locomotives.

That your petitioner is the holder of an accepted draft drawn by your petitioner on the said Chicago, Danville and Vincennes Railroad Company, the said draft bearing date the 27th day of November, A. D. 1874, payable ninety days after date, to the order of your petitioners, and being for the sum of five hundred forty-six and [illegible] dollars.

129 Your petitioner further represents that before the maturity of said draft the receivers were appointed in said cause, and the same remains due and wholly unpaid.

Your petitioner further represents that the said draft was drawn and accepted to pay a bill of supplies furnished to said railroad company by your petitioner; that the said supplies consisted of driving-wheels and other material for use upon a locomotive which your petitioner is informed and believes was used upon the rolling-stock of said railroad company.

Your petitioner therefore prays that an order may be entered directing the receiver to pay the claim of your petitioner out of any money that may be in his hands not otherwise appropriated.

And your petitioner will ever pray, &c.

H. L. LEACH,
General Manager.

(Endorsed:) Filed July 16, '76. W'm H. Bradley, cl'k.

130 Afterwards, to wit, on the 29th day of November, A. D. 1876, said master filed in said clerk's office his report in said entitled cause, which said report is in the words and figures following, to wit

Report of master.

131 EXHIBIT A—LEACH.

This memorandum of agreement between the Hinckley Locomotive Works, a corporation doing business in Boston, Mass., of the first part, and the Chicago, Danville and Vincennes Railroad Company, of Illinois, of the second part, witnesseth:

Whereas the party of the first part has constructed for the party of the second part three (3) locomotive engines and tenders, numbered respectively 25, 26, and 27, and shop numbers 1178, 1179, & 1180, and has received from said party of the second part its notes as follows, to wit: one note, numbered 575, dated Aug. 23, 1873, for thirteen thousand five hundred ($13,500) dollars, payable in four months from its date; one note numbered 576, dated Aug. 18, 1873, for thirteen thousand five hundred ($13,500.0) dollars, payable in five months from its date; and one

note, numbered 577, dated Aug. 25, 1873, for thirteen thousand five hundred ($13,500.0) dollars, payable in five months from its date, all of which notes are dated at New York and signed by W'm D. Judson, president, and countersigned by Amos Tenny, treasurer, and payable at the Marine National Bank, in the city of New York; and whereas the party of the first part, without parting with its property in said locomotive engines and tenders, has allowed the party of the second part to take the same, and put them in or upon its road:

Now it is expressly agreed that at the maturity of said notes the party of the second part shall have the priviledge of renewing the said notes for the additional term of four months, and at the expiration of said additional term, the party of the second part shall have the priviledge of again renewing said notes, one of them for a further pe-
132 riod of four months, and the other two for a period of three months.

It is also agreed that the party of the second part shall pay to the said party of the first part in cash, upon demand, interest upon the said notes, and upon the said renewals, at whatever rates the party of the first part may have to pay, in order to realize cash for the said notes, and for the said renewals.

It is further expressly agreed that if the aforesaid notes shall be well and truly paid, according to the tenor thereof, and in accordance with the terms of this agreement, as above stated, then the party of the first part shall make a bill of sale of said locomotive engines and tenders to the party of the second part, and that the party of the first part shall permit the party of the second part to use said locomotive engines and tenders upon its road until default shall be made in the payment of any of said notes, or the interest thereon, as agreed, or until said party shall undertake to dispose of any of said locomotive engines or tenders, or until any of them shall be attached or taken by a third party, when the party of the first part shall have the right to retain possession of said locomotive engines and tenders, and to dispose of the same at public or private sale, and deducting out of the proceeds and retaining to its own use a sum of money equal to the amount of such of their notes as shall be outstanding and unpaid, and whatever interest may be due thereon and unpaid, together with the costs and expenses attending the sale, shall pay over the balance of net proceeds to the party of the second part.

In testimony whereof each of said parties has caused its president to subscribe his name and affix its corporate seal hereto this first day of September, 1873.

133 [SEAL OF C., D. & V. R. R. CO.]

CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY,
By W. D. JUDSON,
President.

Witness:
G. E. BORLAND.

[SEAL OF HINCKLEY LOCOMOTIVE WORKS.]

HINCKLEY LOCOMOTIVE WORKS,
By DANIEL F. CHILD,
Pres't pro tem.

Witness':
GEO. F. CHILD,
F. L. BALLARD.

134 The six notes of the Chicago, Danville & Vincennes Railroad Company, as follows, to wit: one note, No. 649, dated January 21st, 1874, payable in seven months from its date, for $6,750; one note, No. 650, dated January 21, 1874, payable in seven months from its date, for $6,750; one note, No. 651, dated December 22d, 1873, payable in eight months from its date, for $2,250; one note, No. 690, dated June 22, 1874, payable in four months from its date, for $4,500; one note, No. 691, dated April 25, 1874, payable in nine months from its date, for $6,750; and one note, No. 718, dated July 17th, 1874, payable in seven months from its date, for $13,500.0; all of which notes are dated at New York and signed by W. D. Judson, president, and countersigned by Amos Tenny, treasurer, and payable to the order of the Hinckley Locomotive Works, at the Marine National Bank, in the city of New York, are given in renewal of the three notes of the Chicago, Danville and Vincennes Railroad Company, as follows, to wit: No. 575, dated August 23, 1873, payable in four months from its date, for $13,500; No. 576, dated August 18, 1873, payable in five months from its date, for $13,500.0; No. 577, dated August 23, 1873, payable in five months from its date, for $13,500.0, originally given under the within indenture, dated September first, 1873, and are not in any sense in payment of said original notes, but merely in renewal and extension of the same.

CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY,
By W. D. JUDSON,
President.

135 EXHIBIT B.—LEACH.

This memorandum of agreement between the Hinckley Locomotive Works, a corporation doing business in Boston, Mass., of the first part, and the Chicago, Danville & Vincennes Railroad Company, of the State of Illinois, of the second part, witnesseth:

Whereas the party of the first part has constructed for the party of the second part two (2) locomotive engines and tenders, numbered respectively 28 and 29, and shop numbers 1188 & 1189, and has received, from said party of the second part its notes as follows, to wit: one note numbered 616, dated October 7, 1873, for six thousand ($6,000) dollars payable in five months from its date; one note, numbered 617, dated Oct. 7, 1873, for five thousand ($5,000) dollars, payable in five months from its date; one note, numbered 618, dated Oct. 7, 1873, for twenty-five hundred ($2,500) dollars, payable in five months from its date; one note, numbered 619, dated Oct. 7, 1873, for three thousand ($3,000) dollars, payable in four months from its date; three notes, numbered respectively 620, 621, & 622, dated Oct. 7, 1873, each for two thousand ($2,000) dollars, payable in four months from their date; one note, numbered 623, dated Oct. 7, 1873, for fifteen hundred ($1,500) dollars, payable in four months from its date; and three notes, numbered respectively 624, 625, & 626, each for one thousand dollars, payable in four months from their date, all of which notes are dated at New York, and signed by W'm D. Judson, president, and countersigned by Amos Tenney, treasurer, and payable to the Marine National Bank, in the city of New York; and whereas the party of the first part, without parting with its property in said locomotive engines and tenders, has allowed the party of the second part to take the same and put
136 them in or upon its road:

Now, it is expressly agreed that at the maturity of said notes the party of the second part shall have the privilege of renewing the said notes for the additional term of four months, and at the expiration of

said additional term the party of the second part shall have the privilege of again renewing said notes, the first three, i. e., Nos. 616, 617, and 618, for an additional period of three months, and the other eight for a period of four months.

It is also agreed that the party of the second part shall pay to the said party of the first part, in cash upon demand, interest upon the said notes, and upon the said renewals, at whatever rates the party of the first part may have to pay in order to realize cash for the said notes, and for the said renewals.

It is further expressly agreed, that if the aforesaid notes shall be well and truly paid, according to the tenor thereof, and in accordance with the terms of this agreement, as above stated, then the party of the first part shall make a bill of sale of said locomotive engines and tenders to the party of the second part, and that the party of the first part shall permit the party of the second part to use said locomotive engines and tenders upon its road until default shall be made in the payment of any of said notes, or the interest thereon, as agreed, or until said party shall undertake to dispose of said locomotive engines or tenders, or until any of them shall be attached or taken by a third party, when the party of the first part shall have the right to retain possession of said locomotive engines and tenders, and to dispose of the same at public or private sale, and deducting out of the pro-
137 ceeds and retaining to its own use a sum of money equal to the amount of such of their notes as shall be outstanding and unpaid, and whatever interest may be due thereon and unpaid, together with the costs and expenses attending the sale, shall pay over the balance of net proceeds to the party of the second part.

In testimony whereof each of said parties has caused its president to subscribe his name and affix its corporate seal hereto this eighth day of October, 1873.

{ SEAL OF C., D. & V. R. R. CO. } CHICAGO, DANVILL' & VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

{ SEAL OF HINCKLEY LOCOMOTIVE WORKS. } THE HINCKLEY LOCOMOTIVE WORKS,
By DANIEL F. CHILD, *Pres't pro tem.*

Witness:
GEO. F. CHILD.

138 The five notes of the Chicago, Danville and Vincennes Railroa Company, as follows, to wit:

One note, No. 654, dated Feb'y 2, 1874, payable in seven months from its date, for $6,750. One note, No. 655, dated February 2, 1874, payable in seven months from its date, for $6,750. Two notes, No. 656 and 657, dated February 10, 1874, payable in eight months from their date, for $5,000 each, and one note, dated February 10, 1874, payable in eight months from its date, for $3,500; all of which notes are dated at New York and signed by W. D. Judson, president, and countersigned by Amos Fenney, treasurer, and payable to the order of the Hinckley Locomotive Works at the Marine National Bank in the city of New York. All given in renewal of the eleven notes of the Chicago, Danville and Vincennes Railroad Company, fas ollows, to wit:

No. 616,	dated Oct.	7,	1873,	payable in	five	months from its date for	$6,000
" 617,	"	7,	"	five	"	"	5,000
" 618,	"	7,	"	five	"	"	2,500

No. 619, dated Oct. 7, 1873, payable in four months from its date for 3,000
" 620, " 7, " four " " 2,000
" 621, " 7, " four " " 2,000
" 622, " 7, " four " " 2,000
" 623, " 7, " four " " 1,500
" 624, " 7, " four " " 1,000
" 625, " 7, " four " " 1,000
" 626, " 7, " four " " 1,000

Originally given under the within indenture, dated October eighth, 1873, and are not in any sense in payment of said original notes, but merely in renewal and extension of the same.

CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *Pres.*

Purchaser.	When ordered.	Price.	Terms.
South' Pacific R. Comp.	Jan. 29, 1869.	13,750 00	Cash.
Do.	do.	13,750 00	Do.
Do.	do.	13,750 00	Do.
Do.	do.	13,750 00	Do.
Do.	do.	13,750 00	Do.
Do.	do.	13,750 00	Do.
Iowa River Railroad Comp'y	Feb. 3, 1869.	12,800 00	Do.
European & N. American R.	" 5, "	12,375 00	Do.
Do.	" 5, "	12,375 00	Do.
Boston & Albany R. R. Co.	Mar. 22, "	13,800 00	Do.
Do.	" 22, "	13,800 00	Do.
Vermont & Massachusetts R. R.	" 23, "	13,750 00	Do.
Grand Rapids Narr. Gauge & L. Shore	Nov. 4, 1872.	13,000 00	Cash.
Columbus & Hock' Valley R. R.	" 21, "	14,500 00	Do.
Do.	" 21, "	14,500 00	Do.
Boston, Hartford, & Erie R. R.	Dec. 13, "	14,500 00	Do.
Do.	" 13, "	14,500 00	Do.
Columbus & Hock' Valley R. R.	" 14, "	14,500 00	8 & 12 mo's int., 0,107.00.
Do.	" 14, "	14,500 00	Do.
Chicago, Danvill' & Vincennes R.	Feb. 11, 1873.	13,500 00	Notes at 4 mo's & privilege of 2 renewals of 4 mo's each.
Do.	" 11, "	13,500 00	Do.
Do.	" 11, "	13,500 00	Do.
Do.	" 11, "	13,500 00	Do.
Do.	" 11, "	13,500 00	Do.
Lake Ontario Shore R. R. Co.	" 19, "	14,000 00	3 mo's with int., 87.
Springfield, Athol & N. En. R. R.	Mar. 31, "	13,000 00	3 " " " 107.
Norwich & Worcester R. R. Co.	July 7, "	14,000 00	Cash.

EXHIBIT D.—LEACH.

140	*Description.*		
8-wheeled 30-ton eng. & 8-wh. tender,	16 x 24 cylinders,	5-f't drivers.	
do. do.		do.	do.
do. do.		do.	do.
do. do.		do.	do.
8-wheeled 26-ton eng. & 8-wh. tender,	15 x 22 cylinders,	5-f't drivers.	
do. do.		do.	do.
8-wheeled 30-ton eng. & 8-wh. tender,	16 x 24 cylinders,	do.	
8-wheeled 22-ton eng. & 8-wh. tender,	14 x 22 "	do.	
do. do.	do.	do.	
6-wheeled 28-ton eng. & 8-wh. tender,	17 x 24 cylinders,	& 4-f't drivers.	
do. do.		do.	do.
8-wheeled 30-ton eng. & 8-wh. tender,	16 x 24 cylinders,	5-f't drivers.	
8-wheeled 26-ton eng. & 8-wh. tender,	15 x 22 cylinders,	4½-f't drivers.	
8-wheeled 33-ton eng. & 8-wh. tender,	16 x 24	do.	5-f't do.
do.	do.		do.
do.	17 x 24	do.	do.
do.		do.	do.
do.		do.	do.
do.		do.	do.

6-wheeled 28-ton eng. & 8-wh. tender, 15 x 24 cylinders, 4-f't drivers.
do. do. do.
do. do. do.
do. do. do.
do. do. do.
8-wheeled 30-ton eng. & 8-wh. tender, 16 x 24 cylinders, 5-f't drivers.
8-wheeled 26-ton eng. & 8-wh. tender, 15 x 22 do. 4½-f't do.
8-wheeled 30-ton eng. & 8-wh. tender, 16 x 22 do. 5-f't do.

141 EXHIBIT C.—LEACH.

BOSTON, *Jan.* 1, 1876.

Chicago, Danville & Vincennes R. R. Comp'y to the Hinckley Locomotive Works, D'r.

489 Albany street. Adams Ayer, pres't; F. L. Ballard, treas.; H. L. Leach, sup't.

1875.		
Feb. 28.	For their acceptance, due this day, protested	$546 28
"	expenses of protest	2 30
Mar. 13.	" their note, No. 756, due this day, protested	5,000 00
"	" do. " 757, " " " "	5,000 00
"	" do. " 763, " " " "	1,048 04
"	expenses protest above three notes	4 02
"	their note, No. 762, due this day, protested	2,000 00
"	expenses of protest	1 31
April 12.	" their note, No. 780, due this day, protested	5,083 33
"	expenses of protest	1 25
19.	" their note, No. 781, due this day, protested	3,050 00
"	expenses of protest	1 25
23.	" their note, No. 782, due this day, protested	2,290 00
"	expenses of protest	1 28
27.	" their note, No. 767, due this day, protested	4,500 00
"	expenses of protest	1 31
May 20.	" their note, No. 816, due this day, protested	200 00
"	expenses of protest	1 25
21.	" their note, No. 787, due this day, protested	5,474 58
"	expenses of protest	1 43
31.	" their note, No. 804, due this day, protested	6,980 62
"	expenses of protest	1 30
June 14.	" their note, No. 811, due this day, protested	6,000 00
"	expenses of protest	1 25
18.	" their note, 796, due this day, protested	5,470 20
"	expenses of protest	1 08
142 22.	" their note, No. 814, due this day, protested	3,618 61
"	expenses of protest	1 30
July 14.	" their note, No. 812, due this day, protested	2,815 70
"	expenses of protest	1 25
22.	" their note, No. 815, due this day, protested	10,000 00
"	expenses of protest	1 40
		$69,100 34

Average date, May 19th, 1875.
Interest from May 19, 1875.

143 In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK & JAMES R. FOSDICK, complainant,
vs.
THE CHICAGO, DANVILL' AND VINCENNES R. R. Co., et al., defendant. } In chancery.

In the matter of the intervening petitioners, the Hinckley Locomotive Works.

Testimony taken before Henry W. Bishop, master in chancery of said court

WEDNESDAY, *January* 12*th*, 1876.

resent, R. B. Roberts, esq., of counsel for the claimant; & E. Walker,

esq., of counsel for the defendants; & Mess'rs Crawford & McConnell, of counsel for the intervening petitioners, the first-mortgage bondholders; & Cha's H. Lawrence, esq., of counsel for the intervening petitioners, the Union Rolling Mill Co., and the witness below named.

THOMAS V. TWOMBLY, a witness on behalf of the claimant, being first duly sworn, was examined in chief by M'r Roberts, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. Thomas V. Twombly; residence, Chicago; occupation,
144 master-mechanic of the Chicago & Rock Island Railroad.

Q. You are general master-mechanic of the whole of that road?

A. Yes, sir.

Q. Are you familiar with the construction of locomotives?

A. Yes, sir.

Q. How long have you been engaged as master mechanic?

A. 25 years.

Q. For 25 years?

A. Yes, sir.

Q. State, if you please, whether in October last you made an examination of some locomotives, at the request of M'r Leach, representing the Hinckley Locomotive Company; if so, state what locomotives they were, where they were, and what condition they were, and what their condition was.

A. I went with M'r Leach to look at five locomotives.

Q. At their round-house?

A. Up the Danville & Vincennes Road. I looked at five locomotives there.

Q. Who were present when you got there?

A. One or two men in the round-house. I don't know their names.

Q. Well, M'r Leach was there?

A. Yes, sir.

Q. Did M'r Leach point out the locomotives to you?

A. Yes, sir.

Q. Well, sir, what was their condition?

A. Well, they was what I considered in rather a bad condition?

Q. Did you examine them carefully?

A. Yes, sir.

Q. Well, sir, how much were they depreciated from their original cost.

145 A. Well, I thought the actual value of the engines was about $4,500.00.

Q. Of them all?

A. Of all I looked at I should not judge to be worth more than that.

Q. You thought them worth about $4,500 apiece?

A. Yes, sir.

Q. M'r Twombly, were they saleable at that?

A. It would depend on how bad some road wanted them.

Q. I would like a little more direct answer, if I could get it, than that.

A. If I was buying engines I should not want to pay more than that.

Q. Would you have paid that for a solvent road?

A. Well, I might. I should think that was about the value of them.

Cross-examination by M'r Walker:

Q. You say those engines were worth, at the time you made the examination, in your opinion, $4,500.00 each?

A. Yes, sir.

Q. Had they been new what would have been their value?

A. $6.500.00 to $7,000.00—$7,000.00.

Q. Did you examine each of those five locomotives so as to give an opinion of the depreciation of each one of them?

A. Yes, sir.

Q. You make the average value $4,500.00?

A. Yes, sir.

Q. And the value of a new engine $7,000.00?

A. Yes, sir.

Q. So that the depreciation was about $2,500.00 upon each
146 engine?

A. Yes, sir.

Q. Those engines, I suppose, could all have been put in repair so that they would have been worth as much as new engines?

A. Hardly that—except the natural wear and tear.

Q. Now, what would be the depreciation arising from the natural wear and tear of an engine used fairly for two years, or about what per cent.?

A. About ten per cent.

Q. Then, if these locomotives were worth $7,000.00 each and the natural wear and tear *natural wear* would amount to about $700.00 each year, or fourteen hundred dollars for two years, that is your opinion?

A. Yes, sir; if the engines had been taken care of properly.

Redirect examination by M'r Roberts:

Q. You said that these engines were worth in cash $7,000.00; is that their lowest value?

A. Yes, sir; their lowest value.

Q. What would that class of engines have been worth two and a half years ago?

A. Well, we built engines two and a half years before that cost $9,000.00.

Q. You built them for use; were they saleable at that price; would you have sold them at that?

A. No, I don't know; that was what they cost us.

Q. You would not have been willing to sell them for that?

A. No.

Q. You based your valuation of the per cent. of depreciation,
147 ten per cent., upon the basis of fair usage of locomotives?

Yes, sir.

Recross-examination by M'r Walker:

Q. Do you know what the market value of engines was two years before?

A. I don't know.

In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK & JAMES R. FOSDICK, complainant, *vs.* THE CHICAGO, DANVILLE & VINCENNES R. R. Co. et al., defendant. } In chancery.

In the matter of the intervening petitioner, the Hinckley Locomotive Works.

Testimony taken before Henry W. Bishop, master in chancery of said court.

WEDNESDAY, *January* 12, 1876.

Present, R. B. Roberts, esq., of counsel for the claimant; and E

Walker, esq., of counsel for the defendant; and Mess'rs Crawford & McConnell, of counsel for the intervening petitione's, the first
148 mortgage bondholders; & Cha's H. Lawrence, esq., of counsel for the intervening petitioners, the Union Rolling Mill Co., and the witness below named.

HENRY SCHLACK, a witness on behalf of the claimant, being first duly sworn, was examined in chief by M'r Roberts, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. Henry Schlack; residence, Chicago; occupation, master mechanic of the Illinois Central Railroad Company, Chicago division.

Q. Where are you particularly occupied?

A. At Chicago.

Q. At the shops of the Illinois Central Railroad?

A. Yes, sir.

Q. State, if you please, whether you saw the locomotives under discussion here with M'r Leach, and he ever asked you to look at them; if so, state what their condition was.

A. I don't know whether M'r Leach ever asked me to look at the engines. I was requested to do so by the general manager of the Illinois Central Railroad.

Q. Where did you look at them?

A. Four of them at the shops of the Chicago, Danville & Vincennes Road, and one at our Illinois Central shops.

Q. Did you look at them carefully?

A. Yes, sir.

Q. What would you say was the depreciation in value of those locomotives from the time they were new?

A. I could not say what the original price was. There was two of them I valued at $4,700.00 and three of them at $3,500.00.

Q. Two of them at $4,700.00 and three at $3,500.00?

149 A. Yes, sir.

Q. From the appearance of those locomotives, sir, what sort of treatment had they received?

A. Well, two of the engines was not in such bad condition, but three of them were used rather rough.

Q. Do you know about the value of locomotives, what their saleable price was two years before that—two years and two years and a half before that?

A. No, sir.

Q. You do not know?

A. No; we did not buy any at that time.

Q. Your company bought some of these locomotives?

A. Yes, sir.

Q. Do you know which of them?

A. I know the Danville & Vincennes road number; I don't know the shop number.

Q. The road number was what?

A. 26, 28, and 29.

Q. You describe three that were very much ; which were they?

A. 28 and 29 were in the best condition.

Q. And you got them?

A. We got them.

Q. Do you know what you paid for them?

A. I do not.

Cross-examination by Mr. Walker:

Q. Were you sent there by the general manager?

A. Yes, sir.

Q. And he was negociating for the purchase of three of those engines?

A. Yes, sir.

150 Q. And you were sent there by him to see what their condition was?

A. I had instructions to go there and examine them and report their condition.

Q. Were you instructed to report their value?

A. No, sir. I believe there was a price discussed between the superintendant here and myself.

Q. Mr. Hayes?

A. Yes, sir.

Q. You say you do not know what engines were worth in 1873 in the market?

A. No, sir.

Q. Do you know what the value of such engines were in October, 1875?

A. In 1875, we have bought some engines for $8,000.00 which I considered better than these.

Q. What would you consider one of these engines worth to you now, new?

A. I think they are worth $7,000.00 or *to* $8,000.

Q. In 1875?

A. In 1875.

Q. You say that these engines you don't think were fairly treated; and one of the other witnesses stated the same. I want you to state particularly the condition in which you found these locomotives—in what respect they had been unfairly treated.

A. Some of the fire-boxes I found graveled, the crown sheets burnt; whether from lack of water or mud I don't know.

Q. Those could be repaired, of course, as good as new?

A. Yes, sir.

Q. What would they cost each?

A. To put in a sheet of that kind would be worth about $450.00.

151 Q. For each sheet?

A. Yes, sir.

Q. What other injuries did you discover?

A. I found the frames broke to one of them.

Q. What would it cost to replace them?

A. Well, in fact, I never had to handle three-wheeled engines. I would consider it worth about $1,000.00 to take off that frame.

Q. For each frame?

A. There was only one.

Q. Well, what else?

A. The tire was badly cut, the flanges.

Q. And to that extent they would be unfit for use?

A. It would be necessary to take them off; they would not be fit to run.

Q. Was it an injury that would occur more than their natural use?

A. Yes, sir.

Q. What was damaged on account of the tire?

A. They would have to be taken out and re-turned; that would reduce the material and their value. We have got two of them, all of them

you can just include, and that turning of these tires would be worth about $125.00.

Q. For each engine? Does that include the five?

A. These two do not need it.

Q. The other three?

A. Yes, sir.

Q. Three at $125.00 each?

A. Yes, sir.

Q. Anything on the other two?

A. No, sir.

Q. Well, what else?

152 A. The lagging was burnt, and the jacket was used up on these two.

Q. Now, what would that be worth to replace them?

A. About $78.00 apiece.

Q. What else?

A. That was about the general character of them, what I could find.

Q. Are there any special or extraordinary repairs to be made on either of those locomotives, other than what you have mentioned?

A. No, sir.

Q. I am asking your attention to any special injury.

A. That would be about all the examination made.

Q. What would the depreciation of those engines from natural wear and tear ?

A. The natural wear and tear would be about ten per cent.

Q. Each year?

A. Yes, sir.

Q. And for two years would be $1,400.00 for each engine?

A. Yes, sir.

Q. It would require these other expenditure' you have mentioned?

A. Extra to that.

Q. Did you mention whether of these engines you bought the two best?

A. Yes, sir.

Redirect examination by M'r Roberts:

Q. What is the life of a locomotive engine? You have stated that the depreciation per annum is ten per cent. I want to know what the life of a well cared for, properly attended to locomotive is.

153 A. We have one that is 21 or 22 years old.

Q. Then the depreciation is not ten per cent.; it would take a new engine in ten years?

A. In this time we have to renew a great many articles.

Q. I understand you to testify that the depreciation, naturally, of engines that are well used is ten per cent.; that locomotives only live ten years?

A. Yes; locomotives generally; part of them may not be renewed; you can keep some longer.

In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK & JAMES R. FISH, complanant', *vs.* THE CHICAGO, DANVILL' & VINCENNES R. R. Co. et al., defendant.	In chancery.

In the matter of the intervening petitioner, the Hinckley Locomotive Works.

Testimony taken before Henry W. Bishop, master in chancery of said court.

WEDNESDAY, *January* 12, 1876.

Present, R. B. Roberts, esq., of counsel for the claimant, and E.
154 Walker, esq., of counsel for the defendant, & Mess'rs Crawford & McConnell, of counsel for the intervening petitioners, "the first-mortgage bondholders, and Cha's H. Lawrence, esq., of counsel for the intervening petitioners, the Union Rolling Mill Co., and the witness below named.

S. J. HAYES, a witness on behalf of the complainant, being first duly sworn, was examined in chief by M'r Roberts, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. S. J. Hayes; reside in Chicago.

Q. You are connected with the Illinois Central; state in what way.

A. Superintendant of machinery of the Illinois Central Railroad.

Q. Can you tell me, sir, what the price of locomotives of the size spoken of was two or two and a half years ago—say, during 1873; saleable price of them?

A. We bought four locomotives of about the same weight as M'r Leach's best locomotives, for which $12,550.00 were paid in Philadelphia for two of them, and two Jersey City engines, weighing about 31 tons. They are not the same character of locomotives, but worth about the same, and about the same weight of material in them.

Q. Did you see these locomotives that are in question here?

A. I saw three of them.

Q. At what time?

A. In October last.

Q. Did you examine them closely?

155 A. I examined three of them pretty thoroughly.

Q. Do you know which three those were?

A. I think four of them; the three we bought and one of those that were sent to Boston.

Q. What were the depreciation in value of those locomotives at that time by reason of the way they had been treated?

A. Well, I should rather answer that question in giving the value of the locomotives as they stood at that time. I valued them at four thousand dollars apiece.

Q. That you considered the price at which it was proper to buy them?

A. I considered that about all that we could give.

Q. Could they have realized that if it had been desired to have sold them under the hammer?

A. I don't think they would bring that.

Q. There were four of them that you saw?

A. I think I saw three of them at the time I was there and one at another.

Q. Where were they?

A. At the engine-house of the Chicago, Danville & Vincennes Road. Three I afterwards saw at our own engine-house.

Q. M'r Hayes, you stated that you bought some locomotives about this time. Please state what time in the year 1873 that was that you made the purchase.

A. I think we made the contract in the spring of 1872.

Q. In the spring of 1872?

A. I think it was in the spring of 1872.

Q. What was the price of engines of the same description of these, new, in the fall of 1875? Had the price increased or decreased from 1873?

A. Well, sir, it had decreased.

156 Q. Well, sir, how much?

A. New engines could be bought for about $8,000.00 or $8,800.00.

Q. From the appearance of the locomotives, M'r Hayes, could you determine whether they had been handled in a proper way by competent mechanics or whether they had been hardly treated?

A. I think they had all been neglected; perhaps been allowed to stand out doors and rust. Two of them had been burnt. I think they had received general bad treatment throughout.

Q. The Illinois Central Road purchased some of these engines through you, did not they?

(Objected to.)

A. Yes, sir; purchased three of them.

Q. What did they pay for them?

A. For the best two, $3,500.00 apiece; and for the other one we paid $2,750.00.

Q. For the two better ones, $3.500.00?

A. $3,500.00 apiece.

Q. Are you able to give the numbers of the two better?

A. 28 and 29.

Q. And the other one?

A. 26.

Cross-examination by M'r Walker:

Q. M'r Hays, those locomotives, of course, were susceptible of repair, and of being put in good repair, or you would not have bought them?

A. Certainly.

Q. What did it cost to put these locomotives, each one of them, in good repair?

A. Well, they never could be made as good as new.

157 Q. Well, as good as possible, except wear and tear; the depreciation on account of wear and tear?

A. In the first place, the tires had run about two years, which is a little over one-third of the life-time of tire. The life-time of a is 5 or 6 years. They had been suffered to cut the flange, and you had to cut a good deal more good metal of to make the flange.

Q. Then, to get at it without going over all these things, taking them all together—get at it; all I want is your best judgment.

A. I should think, to put these engines in good order, would be worth $2,500.00 to $3,000.00.

Q. The other?
A. From 5 to 600 dollars less.
Q. It would cost to put one in good repair how much?
A. From $2,500.00 to $3,000.00.
Q. The others from five to six hundred dollars less?
A. Yes, sir.
Q. When you made this examination of these engines, you were talking of purchasing them?
A. I went to value them, in order to give an estimate to our general manager of what they were worth.
A. He proposed to buy them?
A. Yes; and, in order to get at the proper facts, I examined them.

Redirect examination by M'r Roberts:

Q. Did you see the two engines that went back to Boston?
A. I did once.
Q. What was the condition of them?
A. I did not examine them so particularly. One, I think, had
158 the frame broken, and the other had the crown shut down.

In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES R. FISH, complainant, *vs.* THE CHICAGO, DANVILLE & VINCENNES R. R. Co. et al., defendant. } In chancery.

In the matter of the intervening petitioner, the Hinckley Locomotive Works.

Testimony taken before Henry W. Bishop, master in chancery of said court.

WEDNESDAY, *January 12th*, 1876.

Present, R. B. Roberts, esq., of counsel for the claimant; and E. Walker, esq., of counsel for the defendant; & Mess'rs Crawford & McConnell, of counsel for the intervening petitioner, the first-mortgage bondholders; & Cha's H. Lawrence, esq., of counsel for the intervening petitioner, the Union Rolling Mill Company, and the witness below named.

A. H. LE CLERCQ, a witness on behalf of the defendant, being first duly sworn, was examined in chief by M'r Walker, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.
159 A. H. Le Clercq, master mechanic of the Chicago, Danville and Vincennes Railroad Company.
Q. You have charge of the engines on that road?
A. Yes, sir.
Q. And the repairs of them?
A. Yes, sir.
Q. How long have you been engaged in the business—not for this company, but in that business?
A. 25 years.

Q. Are you acquainted with these locomotives that have been referred to by these other witnesses?

A. Partially; yes, sir.

Q. How long have you known them?

A. These particular engines?

Q. Yes.

A. Since June, 1875.

Q. Do you know the condition of those locomotives in the fall of 1875?

A. Yes, sir; I saw them at that time.

Q. Without going into detail, I will ask you what, in your opinion, it would cost to put each of those locomotives in a good state of repairs, as good as they could be made; of course, not including the natural wear and tear they had been subjected to?

A. There was two of them, the $2,000.00 would put them in good running order.

Q. The other three?

A. They would take from three to five hundred dollars more.

Q. About $2,500.00?

A. Yes, sir.

Q. What, in your opinion, would be the depreciation of those locomotives on account of the natural wear and tear, in use of two years; about what per cent., I mean?

160 A. That depends on the user.

Q. Of course, it is contemplated that they have fair usage.

A. We calculate it costs about eight per cent. to keep an engine running.

Q. About eight per cent.?

A. Yes, sir; about that to keep them in running order.

Cross-examination by M'r. Roberts:

Q. You only had known these locomotives since June last?

A. Yes, sir.

Q. You did not know anything of their treatment anterior to that?

A. No, sir.

Q. What facilities has the Danville road for taking care of locomotives?

A. Very good for locomotives.

Q. Were those locomotives taken such care of in your opinion, sir, as they ought to have been?

A. No, sir; I don't think they were.

Q. What was the value of those locomotives at the time the receiver delivered them up?

A. There was two of them that never had run a great deal; they looked a great deal worse than they were.

Q. I asked what their value was.

A. I think those engines—I considered two were worth about $6,000.00 apiece, the other three about $4,500.00.

Q. Do you know the price of locomotives in 1873?

A. I don't, anything more than the price of the engines we were using at that time.

Q. Engines of this class, weighing about the same, and with the same size of cylinder, do you know the price they were sold at in February, 1873?

161 A. There were some sold at about $12,000.00, weighing 62 to 64,000 pounds; a different class of engines.

Q. I want engines of the same class. Do you know what the selling-price of the same kind of engines was in October, 1875?
A. No, sir; I don't know what the selling-price was.
Q. Had they not very much depreciated?
A. Well, they were depreciated some; yes, sir.
Q. I don't mean these locomotives; I mean the selling-price of locomotives generally?
A. Yes, sir.

In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK & JAMES R. FISH, complainant', *vs.* THE CHICAGO, DANVILLE & VINCENNES R. R. Co. et al., defendant. } In chancery.

In the matter of the intervening petitioner, The Hinckley Locomotive Works.

Testimony taken before Henry W. Bishop, master in chancery of said court.

WEDNESDAY, *January* 12, 1876.

Present, R. B. Roberts, esq., of counsel for the claimant, & E. Walker, esq., of counsel for the defendant, Mess'rs Crawford & McConnell, of counsel for the intervening petitione's the first-mortgage bondholders, and Cha's H. Lawrence, esq., of counsel for the intervening petitioners the Union Rolling-Mills Co., and the witness below named.

HENRY L. LEACH, a witness on behalf of the claimant, being first duly sworn, was examined in chief by M'r Roberts, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.
Ans. Henry L. Leach; reside in Boston.
Q. State whether you know the Hinckley Locomotive Works.
A. I do.
Q. Where are they located?
A. In Boston.
Q. What is your official position in regard to it?
A. General manager.
Q. I will ask you a sweeping question, M'r Leach: Do you know of any sale of locomotives by the Hinckley Locomotive Works to the Chicago, Danville & Vincennes Railway Company under contract. If so, state fully and particularly the numbers of locomotives, character of the same, their value, the terms of sale, and exhibit the contracts, if you have them.
A. In February, 1873, we made a contract with the Chicago, Danville & Vincennes Railroad Company, W. D. Judson, president, for ten locomotives; they were to be what are called six-wheeled engines, weighing from 28 to 30 tons each.
Q. What was the size of the cylinders and wheels?
A. The cylinders from 15 to 24; wheels four feet in diameter.
163 Payment was to be made for the engines in notes of the company on four months, with the privilege of two renewals at four

months each. Price to be $13,500.00 each. The contract was drawn up by the parties, giving us a lien on those engines—or rather, we were to hold the ownership of the engines until the notes were paid. In case of the non-payment of the note' we had the privilege of taking the engines and selling them either at public or private sale.

Q. Were all the locomotives held under one contract?

A. That was arranged afterwards; the arrangement was made that we were to take payment of five in bonds of the road, and the other five in notes according to the original contract.

Q. Have you copies of those contracts?

A. I have.

Q. These are the original contracts, are they? (Referring to paper in the hands of witness.)

A. Yes, sir; they are.

Q. Are these correct copies of them?

A. They are.

(Copies of said contract hereto attached as Exhibits A & B, respectively.)

Q. Where are the notes that were given by the Chicago, Danville & Vincennes Railroad Company to the Hinckley Locomotive Works?

A. The protested notes are in the hands of the United States court.

Q. Delivered to the clerk of the United States court?

A. Yes, sir.

Q. At the time of the application for reference to the master?

164 A. Yes, sir.

Q. Did that application have attached to it a copy of your account?

A. It did.

Q. Look at that and say whether that is a copy of it? (Handing witness a paper.)

A. I should say it was.

Q. Look at that and tell us if the balance that is there stated is due the Hinckley Locomotive Works Company, without the item of expense to be spoken of hereafter?

A. It is.

Q. Up to that date?

A. It is.

(Account above referred to is hereto attached as Exhibit C.)

Q. State, if you please, M'r Leach, whether these locomotives were sold at the ordinary price of locomotives at that time on those terms?

A. They were.

Q. State what became of the locomotives?

A. They were taken from the Chicago, Danville & Vincennes Railroad Company in October last.

Q. When were they delivered under this contract to the company?

A. The locomotives were delivered in October, 1873, to the company.

Q. Then you say you took them back from the receiver, General Anderson, in October last?

A. In October last.

Q. What was the condition of the locomotives when you received them back?

165 A. They were a good deal out of order, and needed a good deal of repair.

Q. What was the difference in the value of the locomotives by reason of the use made of them by the company?

A. Well, I should think they were depreciated about two-thirds of their value.

Q. What disposition was made of them?

A. Three of them were sold to the Illinois Central Railroad Company, and two were sent back to Boston.

Q. Two were sent back to Boston by yourself?

A. They sent them.

Q. When you say that the depreciation was two thirds of their value, do you mean the whole five locomotives?

A. I do. I lump them together.

Q. Was not some of them in a worse condition than others?

A. They were.

Q. What expenses have been incurred, M'r Leach, under that contract and this specification that they are to be paid?

A. The expense of the protest of the note, my coming here to Chicago three times, and the expense of a lawyer in looking after my rights.

Q. What were numbers of the five locomotives that were delivered back to you by the receiver?

A. The five under any one of these contracts, or on both?

Q. On both of these contracts. I want you to give the numbers of the locomotives that the receiver delivered back to you?

A. Numbers 25, 26, 27, 28, and 29.

Q. That is what you call the shop number?

A. That is the road number.

Q. Can you give the shop numbers?

A. I cannot; they are mentioned in the contracts—1178, 1179, 1180, 1188, & 1189.

166 Q. State whether the Hinckley Locomotive Company is corporation or a company?

A. A corporation, organized under the laws of Massachusetts—general laws.

Q. Who is president of it?

A. Adams Ayer.

Q. And who secretary?

A. George F. Childs.

Q. You are yourself general manager?

A. Yes, sir.

Cross-examination by M'r Walker:

Q. M'r Leach, how many of these locomotives were sold under the contract?

A. The original contract was for ten.

Q. Were all of them delivered?

A. Ten.

Q. Five paid for by the company?

A. Five paid for in bonds of the company.

Q. These notes that you render, and the statement—is the statement of account and notes for the five locomotives returned?

A. Yes, sir.

Q. Does that account include interest?

A. It only includes the amount of the notes.

Q. What was the contract-price of this five locomotives, each?

A. $13,500.00 each.

Q. That would be $67,500.00?

A. Yes, sir.

Q. You have got it $69,100.00?

167 A. The original notes were given for $13,500.00 each; in the renewals of the notes under the contract, after the time for the renewal had expired which we had agreed to give, they had to pay interest on that renewal, and under that renewal interest was included.

Q. At what rate?

A. Seven per cent. on the note. The rate was according to the contracts, which was the rate of interest that would cover the discounts of the notes that was paid in cash.

Q. I don't find that in this contract, M'r Leach?

A. It is there.

Q. You have given the numbers of the engines, the shop number, and the road number of those which were returned to you under the contract; now tell the numbers of those sold to the Illinois Central Railroad Company?

A. Numbers 25, 26, and 28.

Q. Did you sell them three?

A. Yes, sir.

Q. 25, 26, and 28 were sold?

A. I am not certain; 26, 28, & 29.

Q. The two contracts now shown are for the sale of five locomotives, one contract for the sale of 2, and the other for the sale of 3; are these the five locomotives that were returned by the receiver?

A. They were.

Q. That return was made under that agreement and an order of court to the receiver, and filed by the receiver in court in this case?

A. Yes, sir; made by order of the court.

Q. Did you make a thorough examination of the condition of each of those locomotives?

A. No, sir; not thoroughly myself.

168 Q. You have stated that the depreciation, upon an average, was two-thirds of the original value?

A. I judged it to be two-thirds.

Q. Do you give it as your opinion that that depriciation is two-thirds of their value?

A. I give it as my opinion as to the saleable value of the engines.

Q. I am not talking of the saleable value, I am speaking of their actual value?

A. No, sir; I should modify that somewhat as to the actual value.

Q. How much has been their depreciation in actual value?

A. About one-half.

Q. Do you say that engine 25 was depreciated one-half?

A. I think so—that is the average.

Q. I put this question: if some engines had depreciated more than the other, if you could not fix the value upon each, how could you fix the average value?

A. What is the question?

Q. Whether you can fix the actual value of each engine separately?

A. I don't think I can.

Q. When were these engines delivered to the company?

A. I think in October, 1873.

Q. Were the completed ready for delivery at the date specified in this contract?

A. Yes, sir; I think they were.

Q. Do you know how long these engines had been in use on the road before they were returned to you?

A. About two years.

169 Q. Can you describe particularly the injury to either of the locomotives?

A. Yes, sir.

Q. Did you come here three times from Boston in this business wholly?

A. Not entirely.

Q. You had other business; you are travelling for the company mostly?

A. No, sir.

Q. Have you made an estimate of the actual expenses attending the sale of these locomotives?

A. No.

HENRY L. LEACH, having been recalled for further examination, testified as follows:

By M'r Roberts:

Q. You state in your examination, M'r Leach, that the price at which these locomotives were purchased was the usual price at that time.

A. I did.

Q. Will you state now what other locomotives your company sold o the same character at that time and at what price.

A. I have a statement of engines having been sold by our company from 1869 to 1873, giving the prices, size of engines, and number, which I submit.

Q. State what paper this is.

A. It is a copy of our order-book.

Q. For what time?

A. It is part of our orders from 1869 to 1873.

(Paper referred to offered in evidence as Exhibit C.)

170 In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FASDICK ET AL.
vs.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company. } In chancery.

On the intervening petition of the Hinckley Locomotive Works.

Master's report.

To the honorable the judges of the said court:

I, Henry W. Bishop, master in chancery, to whom, by an order of said court entered herein, the intervening petition of the Hinckley Locomotive Works was referred for examination and report, hereby report that having given notice to the parties interested that a hearing for the purposes in said order expressed would be had at my office on Friday, the 14th day of July, A. D. 1876, I was on that day attended by Col. R. Biddle Roberts, counsel for the intervening petitioners; by M'r Walker, as counsel for the defendant; by Messrs. Lawrence, Campbell, & Lawrence, counsel for the trustees; and by Henry Crawford, esq., counsel for intervening bondholders, and by M'r Leach, General Anderson, and Joseph E. Long, witnesses produced in behalf of petitioners, whose tes-

timony was duly taken and is herewith reported; from examination of which I find that a contract was entered into between the peti-
171 tioners and said railroad company some time during the year 1872, for the purchase of five locomotive engines, at the stipulated price of $67,500; that said engins were delivered to said company, and by them accepted and used continuously until the fall of 1875, when they were returned to the petitioners. At that time no part of the purchase money had been paid, but a payment was then made by General Anderson, then receiver, of $175 a month for the use of each engine during the time the road was in the hands of said receiver.

The testimony shows that the engines were surrendered in an injured condition, and that sales were subsequently made of three of them to other companies at greatly reduced rates, and that their value at that time was about one-half of their value at the time they went into the hands of the defendants' road. The precise amount to the payment of which the petitioners are entitled cannot be definitely ascertained from the testimony, except upon the basis suggested by General Anderson, that a payment should be made by way of compromise of an amount which would be fifty per cent. of the original contract-price, after deducting the amount realized from the sale of the engines to other parties, and a like sum for those unsold. This seems to me to be a just and equitable conclusion, and I therefore recommend the allowance of that amount, to wit, the sum of eighteen thousand dollars, in favor of the petitioners as a compromise settlement of their claim.

All of which is respectfully submitted.

H. W. BISHOP,

172 *Master in Chancery for the Circuit Court of the United States for the Northern District of Illinois.*

173 In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK ET AL., COMPLAINANTS,
vs.
CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY, DEFENDANT. } In chancery.

On intervening petition of the Hinckley Locomotive Works.

Testimony taken before Henry W. Bishop, master in chancery of said court.

FRIDAY, *the 14th day of July, A. D.* 1876.

Present, R. Biddle Roberts, esq., of counsel for intervening petitioner, & E. Walker, esq., of counsel for defendant, & Mess'rs Lawrence, Campbell & Lawrence, of counsel for trustees, and the witness below named.

M'r LEACH, a witness on behalf of the petitioner, being first duly sworn, was examined in chief by M'r Roberts, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Q. M'r Leach, you have been examined before in this claim?
A. Yes, sir.
Q. Will you state, if you please, what you got for the locomotives that you received of the Danville Railroad Company, after they were urrendered to you?

174 A. Three of them were sold; the three that we considered best. The other two we have. Two of those were sold at $3,750.00, and one at $2,750.00.

Q. What did you consider the two remaining ones worth at the time the Illinois Central took the other three?

A. At the time, they had their choice of the three at the price named. They bought two for $3,750.00, and had their choice of these three at $2,750.00. I estimated the other two that we took at the same price as the one we sold to the Illinois Central for $2,750.00.

Q. That would make a total of how much for the five locomotives?

A. $15,750.00.

Cross-examination by M'r Walker:

Q. When were those locomotives delivered to the company?

A. To the railroad company?

Q. Yes.

A. In the summer and fall of 1873.

Q. Do you remember the contract-price?

A. $13,500.00 each.

Q. Have you received any payment from the railroad company since the delivery of the locomotives, which you received back from the receiver?

A. Not any.

Q. You say you sold three of those locomotives to the Illinois Central Railroad Company?

A. Yes, sir.

Q. Did you make efforts to sell them to any other companies?

A. I did.

175 Q. Was that the best price you could effect a sale of the locomotives for?

A. It was; I held them here for several days, and interviewed the officers of the several companies, and could not sell to other companies, and was obliged to take that sum.

Q. Have you disposed of the others?

A. I have not.

(Signature waived by agreement.)

176 In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK ET AL., COMPLAINANTS,
vs.
CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY, defendant. } In chancery.

On intervening petition of the Hinckley Locomotive .

Testimony taken before Henry W. Bishop, master in chancery of said court.

FRIDAY, *the 14th day of July, A. D.* 1876.

Present, R. Biddle Roberts, esq., of counsel for intervening petitioners, & E. Walker, esq., of counsel for defendant, & Mess'rs Lawrence, Campbell & Lawrence, of counsel for trustees, and the witness below named.

JOSEPH E. YORNG, a witness on behalf of the petitioner, being first

duly sworn, was examined in chief by M'r Roberts, and deposes and says as follows:

Q. M'r Yorng, do you know of the purchase of these locomotives from the Hinckley Locomotive Works?

A. I know that they were delivered to the Danville Railroad Company, and I know by correspondence that they were purchased.

Q. Do you know that they were used by the road?

A. Yes, sir.

Q. Do you know how long?

177 A. They were used from the time of their delivery, which was in 1873, to the 1st of January, 1875.

Q. They were in constant use up to the time you left the road?

A. Yes, sir.

Q. Do you know anything of their condition when they left the road?

A. They had been in constant use from the time they were received to the time I left the road without having what we call general repairs, and, of course, had become considerably worn; it is customary to repair locomotives about once in two years.

Q. These had not received general repairs?

A. No, sir.

(No cross-examination.)

(Signature waived by agreement.)

178 In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK ET AL., COMPLAINANT,
vs.
CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY, defendant. } In chancery.

On intervening petition of the Hinckley Locomotive-Works.

Testimony taken before Henry W. Bishop, master in chancery of said court.

FRIDAY, *the 14th day of July, A. D.* 1876.

Present, R. Biddle Roberts, esq., of counsel for intervening petitioner, & E. Walker, esq., of counsel for defendant, & Mess'rs Lawrence, Campbell & Lawrence, of counsel for trustees, and the witness below named.

ADNA ANDERSON, a witness on behalf of the petitioner, being first duly sworn, was examined-in-chief by M'r Roberts, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. Adna Anderson; receiver of C., D. & I. R. R. Co.

Q. General, have you lately examined the claim of the Hinckley Locomotive Company for certain locomotives furnished by the Danville road?

A. I have.

179 Q. You are familiar with the contract and the notes, and the disposition of the locomotives, are you?

A. I know the facts that such contracts existed, and that notes were given in payment for certain engines.

Q. You also know the facts that locomotives were delivered up, do you?

A. I do.

Q. How many, sir?

A. Five.

Q. General, in view of all the circumstances, what do you think would be a fair and equitable amount to pay the Hinckley Locomotive Company under that contract? And if you answer that, please give the details, and reasons for the same.

A. Well, under the original contract, as made between the railroad company, the locomotive company was to receive $67,500.00 for five engines. This was in 1873, I believe. The engines were used on the road continuously for between two and three years; then they were returned to the locomotive-works, pretty badly worn. They were returned in the fall of 1875 by me, as receiver of the road, and I paid them rent for the use of the engines during the time they were in my possession. At that time they had never received anything for the engines, either principal or interest, from the railroad company, and it seems to me that, in view of all the facts in the case, the position in which the property is now placed, and the general circumstances, that, if the locomotive-works could be paid one-half the price of the engines, as they first agreed to sell them, that it might be as near fair as could be got at at this time.

180 Q. How much, general, did you pay in rental for the time you used them? Do you know whether they were paid any rental for the time they were used by the other receiver; had they ever paid them?

A. They had not paid any rental.

Q. What amount did you pay. What amount per month?

A. I paid $175.00 a month for each engine for the time I actually used them. I paid $1,750.00 for the time that I had them.

Q. Would you regard that as a fair rental for the length of time they had been used?

A. Yes; I think that was a low rental for the engines, taking the whole time they were in the employ, because they were in better condition when they first came on the road; at the time I had them they were not so well.

Cross-examination by Mr. Walker:

Q. You accounted for the rent of these engines from June 1st until the day the Hinckley Locomotive-Works received them back?

A. I did.

Q. Then you say that fifty per cent. would be, in your opinion, equitable and just in settlement of their claim? Are there any credit which you would make against that allowance?

A. Yes, sir; I think whatever the parties could get for the engines ought to come out of that. The engines I know were in pretty bad shape when they were returned to the company, and I have understood some of them were sold at a very low figure. Whatever price that was I think should come out.

181 Q. You think then that fifty per cent. of the purchase, less the amount realized for the locomotives, would be a fair settlement?

A. Yes, sir.

Q. You have no personal knowledge of the amount at which those engines were sold?

A. I have not.

Q. State a little more explicitly what you mean by fifty per cent.; you mean fifty per cent. of the amount on the first of June?

A. Fifty per cent. of the amount that was originally agreed to be paid.

I want to explain that I think that would be fair in the nature of a compromise, not as being the value of the engines.

Q. As receiver of the road, then, you recommend a settlement upon the terms that you have stated?

A. On the general interests of the property, I would.

(Signature waived by agreement.)

182 In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK & JAMES D. FISH, complainants, *vs.* CHICAGO, DANVILLE & VINCENNES RAILROAD Company, defendant. } In chancery.

On the intervening petition of the Hinckley Locomotive Works:

Testimony taken before Henry W. Bishop, master in chancery of said court.

TUESDAY, *the 27th day of June, A. D.* 1876.

Present, R. Biddle Roberts, esq., of counsel for intervening petitioner, & Henry Crawford, esq., of counsel for certain bond-holders, and the witness below named.

ADNA ANDERSON, a witness on behalf of the petitioner, being first duly sworn, was examined in chief by M'r Roberts, and deposes and says as follows:

Q. You are familiar with the Hinckley Locomotive Works and with the Danville Company. Will you be good enough to give a statement of what was done with the locomotives, or any of them, and what your views are with regard to that claim?

A. When I took possession of the road I found five locomotives on it that had been bought from the Hinckley Locomotive Works, in Boston, for which the notes of the company had been given, and
183 on which no money had been paid, but the engines were not adapted to the service of the road, and I surrendered them to the owners.

Q. You surrendered them to the representative of the works?

A. Yes, sir; to the owners.

Q. How many did you surrender, general?

A. Five.

Q. That is, you surrendered the whole of them?

A. That was all to whom the Hinckley Locomotive Works had retained the title.

Q. You have also a copy of that contract, have you not, general?

A. I have.

Q. State, if you please, what the difference was between the value of the locomotives as surrendered and the amount of the claim.

A. That is pretty difficult to do. The engines were bought at a time when engines were at the very highest, in 1872, and they were taken back when engines were down at the very bottom price. I think, to get at it comparatively, at the time they were surrendered they were worth about one-half what they were when they came on to the road.

Q. You think they were worth about one-half?

A. Perhaps sixty per cent.

Q. Do you think, general, that they were sold very much below that?

A. Yes, sir. I know that two of them were sold below that. I don't know about the other three. The manager of the Locomotive Works told me that he had sold them.

Cross-examination by Mr. Crawford:

184 Q. General, when did you surrender these engines to the Hinckley Locomotive Works?

A. In September, 1875.

Q. They received them, didn't they?

A. They did.

Q. They cancelled the contract?

A. Not exactly.

Q. They surrendered all the notes, didn't they?

A. They did, but they surrendered them to the clerk of the court here.

Q. Since that time, September, 1875, the locomotives have not been in your possession as the receiver?

A. They have not.

Q. Did you pay anything for the rental of the locomotives up to the time that you delivered over the possession of them?

A. I did not. I paid for their use while they were in my possession.

Q. So far as the former receiver is concerned, under that trust did the owners receive anything for the use of the locomotives?

A. Nothing at all.

Q. Then the demand of the Hinckley Locomotive Company is by virtue of the original contract and the liabilities incident to that under it?

(By M'r Roberts. I object to the question, the answer being a matter of law and not a matter of fact.)

A. Not entirely.

Well, then, what?

A. They have a claim against the account of the former receivers for their use.

Q. For their use during their receivership?

185 A. Yes, sir.

Q. Outside of that matter, the matter which was inquired about by Colonel Roberts, is it not a matter relating exclusively to the original contract?

A. So far as I know, it is.

Q. Those engines outside of the price, when you surrendered them, state whether, in your judgment, they were or were not suitable for the business of the road.

A. They were very unsuitable.

Q. If the price had been suitable, satisfactory, would they have been valuable to use on the road?

A. They would not.

Q. Was not that one of the reasons why you surrendered them to the owners?

A. That had its weight. I thought I could get along without the use of the engines.

Redirect examination by M'r Roberts:

Q. Had the engines been used considerably on the road, general?

A. Yes, sir; they had been used a good deal.

Q. They had been used a good deal?

A. Yes, sir.

Q. They had been not only used but abused?
A. I think that they had from their looks.
(Signature waived.)

(Endorsed.) Filed November 29, 1876. W'm H. Bradley, cl'k.

186 Afterwards, to wit, on the 5th day of December, A. D. 1876, in the record of the proceedings of said court in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

187 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court thereof.

WILLIAM R. FOSDICK AND JAMES D. FISH, complainants,
vs.
THE CHICAGO, DANVILLE & VINCENNES Railroad Company, James Elwell, and R. Bidwell Roberts, defendants.
} In chancery.

Decree.

It appearing to the court that the said several defendants have entered their appearance, and filed their several answers in said cause, and that the said complainants have filed their replications to the said several answers, and that heretofore the said cause was by order of said court referred to Henry W. Bishop, the master in chancery of said court, to take proofs and report, and that the report of said master was made and filed in said cause on the 24th day of June, A. D. 1876, and that the exceptions to said report have been and are overruled by the court:

Now, this day, this cause came on to be heard upon the said bill, the answers of said defendants, and the replications thereto, and the report of said master, and proofs taken in open court;

And it appearing to the court that the said defendant, the Chicago, Danville and Vincennes Railroad Company, was organized as a corporation, under and by virtue of the laws of the State of Illinois, during the year A. D. 1865, and from thence hitherto has been and still is such
188 corporation, and that as such corporation it was authorized to borrow money, and execute its bonds therefor with interest coupons annexed, and secure the payment of the same by mortgage or deed of trust upon its railroad and property then existing or afterwards to be acquired;

And it further appearing to the court that heretofore, and on the 10th day of March, A. D. 1869, the said railroad company caused to be executed and issued twenty-five hundred (2,500) bonds, numbered from one (1) to twenty-five hundred (2,500), both inclusive, each for the sum of one thousand (1,000) dollars, payable in gold coin on the first day of April, in the year nineteen hundred and nine (1909), with interest at the rate of seven (7) per cent. per annum in gold coin, payable semi-annually on the first days of April and October in each year, and that to secure payment of said bonds and the interest coupons thereto attached, the said railroad company, on the said 10th day of March, A. D. 1869, executed and delivered to the said complainants, William R. Fosdick

and James D. Fish, as trustees, a mortgage, or deed of trust, of even date with the said bonds, in and by which the said railroad company conveyed to the said trustees all and singular the entire railroad of the said railroad company, lying, being, and extending from its terminus in the city of Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, and thence southeasterly to a point on the State line of the State of Indiana, joining and connecting at said point with the Evansville, Terre Haute and Chicago Railroad, being in length about one hundred and forty (140) miles, with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels connected with or used in the using or operating of said railroad or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said railroad company then owned and possessed, or might thereafter acquire, either in law or equity, of every kind whatever, appurtenant thereto;

And it further appearing to the court that the said deed of trust, so executed and delivered to them as aforesaid, was by them thereafter, and during the said month of March, A. D. 1869, duly filed for record and recorded in each of said counties of Cook, Will, Kankakee, Iroquois, and Vermillion, in the State of Illinois, and thereby then and there became, and was and still is, a first lien upon all of the railroad, property, franchises, and appurtenances in said deed of trust described;

And it further appearing to the court that the said railroad company had, long prior to the filing of the bill in said cause, sold and disposed of all of the twenty-five hundred bonds secured by said deed of trust,
189 and that the same, and the coupons thereto attached, were then and there all outstanding and valid obligations of said railroad company, and secured to be paid by the said trust-deed;

And it further appearing to the court that heretofore and on the 4th day of March, A. D. 1872, the said Chicago, Danville and Vincennes Railroad Company entered into articles of consolidation with the Rossville and Indiana Railroad Company, which was then and there a corporation of the State of Illinois, whereby the said two corporations became and were consolidated under the name and style of the Chicago, Danville and Vincennes Railroad Company;

And that thereafter and on the 9th day of March, A. D. 1872, the said last-named company entered into articles of consolidation with the Western Indiana Railroad Company, which was then and there a corporation organized and existing under the general laws of the State of Indiana, by which said articles the said two corporations became and were a consolidated corporation by the name and style of the Chicago, Danville and Vincennes Railroad Company, and became, and was then and there, and from thence hitherto has been and still is a corporation in the State of Indiana as well as in the State of Illinois; and as such corporation of the State of Indiana was authorized to construct, maintain, and operate a line of railroad extending from the boundary-line between the States of Indiana and Illinois, at a point in Warren County, southwardly through the counties of Warren, Fountain, Parke, and Clay, to the town of Brazil in said last-named county, with branches to coal-mines, and other appurtenances;

And it further appearing to the court that thereafter, and on the 12th day of March, A. D. 1872, the said consolidated corporation, for the pur-

pose of providing means to construct and equip the line of said company in Indiana, caused to be executed fifteen hundred (1,500) bonds, each for the sum of one thousand dollars, payable on the first day of April in the year nineteen hundred and twelve (1912), with interest at the rate of seven (7) per cent. per annum, both principal and interest payable in American gold coin, which said bonds were numbered from 2,501 to 4,000, inclusive, and were of the same form as the said Illinois division bonds, and had similar coupons attached;

And it further appearing to the court that for the purpose of securing the payment of said Indiana division bonds, the said railroad company on the said 12th day of March, A. D. 1872, executed and delivered to the complainants, William R. Fosdick and James D. Fish, as trustees, its certain mortgage or deed of trust, in and by which the said railroad company conveyed to the said trustees all and singular the entire railroad of said railroad company, situate, lying, and being in the State of Indiana, commencing on the boundary-line between the States of Illinois and Indiana, in the township of Marshfield, and county of Warren, in the State of Indiana, at the point where it connects with the road of the said company terminating on the eastern boundary-line of the State of Illinois, in the town of Ross, in Vermillion County, in said last-named State, and distant about ten
190 miles southeasterly from the village of Rossville, extending thence in a southeasterly direction to Covington, in Fountain County, thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also, a branch road, extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburgh, in said county, the entire length of road being about eighty miles; and also all such additional branch roads as said railroad company might thereafter construct, for the purpose of extending its tracks into the coal and mining regions in the vicinity of said main lines of road, with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said company then had or owned and possessed, or might thereafter acquire, either in law or equity, of every kind whatever appurtenant thereto;

And it further appearing to the court that the said trust deed was thereafter, and during the month of March, A. D. 1872, duly recorded in each of the counties of Warren, Fountain, Parke, and Clay, in the State of Indiana, and then and there thereby became and was, and still is, a first lien upon all of the railroad, property, franchises, and appurtenances in said trust deed described;

And it further appearing to the court that of the said fifteen hundred bonds there had been issued and sold, prior to the filing of the bill in this cause, twelve hundred and forty-three (1243) thereof, and that the remaining two hundred and fifty-seven (257) of said fifteen hundred bonds had been issued and pledged as collateral to certain floating indebtedness of said company, and that all of the said fifteen hundred

bonds, and the coupons thereto attached, are still outstanding and secured by the said last-mentioned trust deed;

And it further appearing to the court that thereafter, and on the 24th day of April, A. D. 1872, the said railroad company executed and delivered to the said complainants, as trustees, a certain mortgage or trust deed, of that date, in and by which the said railroad company then and there conveyed to the said complainants, for the purpose of more fully securing and assuring the punctual payment of the said two millions five hundred thousand dollars of bonds hereinbefore mentioned as numbered from one (1) to twenty-five hundred (2500), both inclusive, dated March 10th, 1869, and due April 1st, 1909, all and singular the entire division of the railroad of the said company, situate, lying, and being in the State of Indiana, commencing on the boundary line between the States of Illinois and Indiana,
191 in the township of Marshfield and county of Warren, in the State of Indiana, at the point where it connects with the road of the said company, terminating on the eastern boundary line of the State of Illinois, in the town of Ross, in Vermillion County, in said last-named State, and distant about ten miles southeasterly from the village of Rossville, extending thence in a southeasterly direction to Covington, in Fountain County, thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also, a branch road extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg, in said county, the entire length of road being about eighty miles; and also all such additional branch roads as said company might thereafter construct in the State of Indiana, for the purpose of extending its tracks into the coal and mining regions in the vicinity of said main lines of road, with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said company then had or owned and possessed, or might thereafter acquire, either in law or equity, of every kind whatever, appurtenant thereto;

And it further appearing to the court that in and by the said last-mentioned trust deed the said railroad company, for the purpose of more fully securing and assuring the punctual payment of the said one million five hundred thousand dollars of bonds hereinbefore mentioned as numbered from twenty-five hundred and one (2501) to four thousand (4,000), inclusive, dated March 12th, 1872, and due April 1st, nineteen hundred and twelve (1912), and the interest thereon, also conveyed to the said complainants, as trustees, all and singular the entire railroad of the said company, lying, being, and extending from its terminus, in the city of Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, being in length about one hundred and thirty miles, with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and

all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said company then had or owned and possessed, or might thereafter acquire, either in law or equity, of every kind whatever, appurtenant thereto;

192 And it further appearing to the court that the said trust deed was duly delivered to said trustees and accepted by them as further security for the uses and purposes therein expressed, and that it then and there became and was a second lien upon all of the said railroad, property, franchises, and appurtenances in the State of Indiana in the said deed described, as security for the payment of the said twenty-five hundred bonds, numbered from one (1) to twenty-five hundred (2,500), both inclusive, and that the said mortgage then and there became and was a second lien on the line of railroad of said company in the State of Illinois, and the franchises and appurtenances thereof, as in the said trust-deed described, as security for the payment of the said fifteen hundred bonds numbered from twenty-five hundred and one (2,501) to four thousand (4,000), both inclusive, except as provided by the last clause of said deed which was and is as follows;

"The foregoing grants, conveyances, and covenants in this indenture contained, are made and entered into by the Chicago, Danville and Vincennes Railroad Company, party of the first part hereto, upon the express understanding, agreement, and condition that in case the party of the first part, or its successors or assigns, shall deem it necessary or desirable, at any future time, in consequence of an increase of the traffic of the said railroad, to issue and dispose of any amount of bonds, or other evidences of indebtedness, for the purpose of providing the means for the purchase of additional rolling-stock and equipment for the use of said railroad, or of said company, its successors or assigns, or for the improvement of said railroad or property, that then, and in that case, the said Chicago, Danville and Vincennes Railroad Company, its successors or assigns, may secure the payment of the principal and interest of such bonds or other evidences of indebtedness so issued and disposed of, by mortgage upon all the roads and property of said company hereinbefore mentioned and described, and that such mortgage, when so made and executed, shall constitute and be, and become a lien upon all said roads and property prior to and having precedence of the liens hereinbefore provided for by this instrument;"

And it further appearing to the court that of the lines of railroad in said several mortgages described, there had been constructed and put in use by the said company within the State of Illinois at the time of the filing of the bill in this cause, that portion of the line commencing at Dalton, about twenty (20) miles south of the city of Chicago, and running thence southerly to Danville, in the county of Vermillion, a distance of one hundred and eight (108) miles, with a branch from Bismarck (a point on the main line in said Vermillion County), southeasterly to the line between the States of Indiana and Illinois, a distance of four and six-tenths ($4\frac{6}{10}$) miles, and that there was also owned and operated by said company terminal tracks and sidings within and near the city of Chicago, of the aggregate length of seven and eighty one-hundredths miles ($7\frac{80}{100}$), with the appurtenances thereto, making a total length of line in the State of Illinois of about one

193 hundred and twenty and four-tenths ($120\frac{4}{10}$) miles, and that said company has acquired for the uses and purposes of said railroad and the operation thereof, within the said city of Chicago, the south eighteen (18) feet of lot twelve (12), lot thirteen (13), and lot sixteen (16) in

block thirteen (13), and lot six (6) in block nine (9), Carpenter's addition to Chicago; lot twenty-four (24) in block seven (7), Carpenter's addition, subject to an encumbrance of twenty-five hundred (2,500) dollars, lots twenty-nine (29), thirty (30), and thirty-two (32), in block (4), Magie and High's addition to Chicago, with six hundred and eighty (680) feet of the tracks hereinbefore mentioned, situated thereon, and also with an engine-house thereon; said lots twenty-nine (29), thirty (30), and thirty-two (32) being subject to an encumbrance of about twenty-three hundred (2,300) dollars, and also a leasehold interest in lot thirty-one (31) in said block four (4), Magie and High's addition to Chicago; the remaining tracks within said city being upon ground not owned by said company, but which it has the right to occupy under contract, and that the tracks near said city hereinbefore mentioned are three and five one-hundredths miles in length, and situate on the right of way of the Chicago and Southern Railroad Company, under contract with it;

And it further appearing to the court that the said Chicago, Danville and Vincennes Railroad also owns an undivided interest in an engine-house of fourteen (14) stalls, situate on the grounds of the said Chicago and Southern Railroad Company at Corwith, adjacent to the city of Chicago, also a water-tank on the ground of said Chicago and Southern Railroad Company near the Chicago River, and that the said company also uses the tracks of the Chicago and Southern Railroad Company, and of the Pittsburg, Cincinnati & St Louis Railway Company from Thornton, near the terminus of its line, to its terminal tracks in Chicago, under contracts with said companies severally; and that all of the line so constructed and in operation within the said State of Illinois, together with the contract rights of said company in the use of the tracks of the said Chicago and Southern Railroad Company, and the said Pittsburgh, Cincinnati and St Louis Railway Company from said Thornton to Chicago, constitute the Illinois division of the said railroad, and with the franchises, property, and appurtenances thereof, and its rolling-stock, tools, and fixtures, was and is all included within and a part of the premises conveyed to said complainants as trustees by the said trust-deed, dated March 10th, 1869, and that the said trust-deed is a first lien thereon as security for the payment of the bonds and coupons therein and hereinbefore mentioned and described;

And it further appearing to the court that the said company, at the time of the filing of said bill, had constructed and put in operation its line of road from a point on the State-line between the States of Illinois and Indiana, where the Bismarck Branch of the Illinois division intersects the same to Snoddy's Mills or Coal Creek, a distance of nineteen and five-tenths (19⅝) miles, with various branches to coal-mines aggregating one and sixty-three one-hundredths (1 63/100) miles in
194 length, and that the line of road from Snoddy's Mills to Montezuma, a distance of about eighteen (18) miles, is partly constructed, and the line from Montezuma to the Brazil coal-field, a distance of about twenty-five (25) miles, is nearly completed except track, and that about two miles of track was laid thereon, making total of twenty-three and thirteen one-hundredths miles of completed road, and forty-three (43) miles of partially completed road in the State of Indiana, and constituting the Indiana division of said railroad, which, together with the franchises, property, and appurtenances thereof, and its rolling stock, tools, and fixtures, was and is included within and a part of the premises conveyed to said complainants as trustees, by the said trust-deed of March 12th, 1872, and that said last-mentioned trust-deed is a first lien thereon as a security for the payment of the said fifteen hundred bonds and the coupons thereof in said trust-deed described;

And it further appearing to the court that the said railroad company at the time of the filing of said bill owned and had in use a large amount of rolling stock upon the said line of railroad in the States of Indiana and Illinois, all of which was and is covered by and described in the said several mortgages, and that of the said rolling stock the portion belonging to the said Illinois division and now in the possession of the receiver appointed in this case, is as follows:

Twenty-five (25) locomotives, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 24, 30, 31, 32, 33, and 34.

Six (6) passenger-cars, numbered 3, 4, 5, 6, 7, and 8.

Three (3) baggage-cars, numbered 2, 3 and 4.

Three (3) mail-cars, numbered 1, 3 and 4.

Eight (8) caboose-cars, numbered 3, 4, 5, 6, 7, 8, 9, and 10.

One hundred and sixty-one (161) box-cars, being those bearing numbers between 564 to 615, both inclusive, and 1,001 to 1,115, both inclusive.

Eighty-five (85) box-cars (Adams), numbered 1,136 to 1,220, both inclusive.

Three hundred and eighteen (318) coal cars, being those bearing numbers between 1 to 100, both inclusive, and between 145 to 376, both inclusive.

One hundred and eighteen (118) block coal cars, being those bearing numbers between 01 to 0119, both inclusive.

Thirty-four (34) stock-cars, being those bearing numbers between 501 to 534, both inclusive;

And it further appearing to the court that the said railroad company has paid all of the coupons which became due on the said Illinois and Indiana division bonds, up to and including those which fell due on the first of April, A. D. 1873, and that none of the coupons which have matured since that time have been paid;

And it further appearing to the court that after said railroad company had made default in the payment of the coupons of the said
195 bonds maturing October 1st, 1873, and, to wit, on the 11th day of November, 1873, the said railroad company issued a circular to its bondholders, in and by which it proposed that the holders of bonds should deposit with complainant, William R. Fosdick, as trustee, the coupons due October 1st, 1873, April 1st, 1874, October 1st, 1874, and April 1st, 1875, and receive in exchange therefor the convertible bonds of said railroad company, dated January 1st, 1873, payable February 1st, 1893, bearing interest at seven (7) per cent. per annum, with coupons payable the 1st of February and August of each year, principal and interest in gold; said bonds to bear interest from February 1st, 1874, and to be received by the bondholders at seventy-five (75) per cent. of their par value; also scrip certificates bearing interest the same as the bonds to be issued for fractional sums, and exchangeable for the convertible bonds, when presented in sums of five hundred (500) or one thousand (1,000) dollars; the coupons thus deposited in trust, to be held by the trustee until October 1st, 1876, after which the coupons to be canceled by the trustee and surrendered to the company, but in case of non-payment of any coupons, coming due up to October 1st, 1876, the coupons deposited with the trustee were to be surrendered to the original owners upon the return of the second-mortgage bonds, or scrip certificates which had been issued for them;

And it further appearing to the court that in response to said proposition the holders of two hundred and seventy-one thousand five hundred dollars ($271,500) of said Illinois bonds, placed in the hands of

said Fosdick, as trustee, the coupons thereof, which fell due October 1st, 1873, to April 1st, 1875, inclusive, and received therefor convertible bonds, at seventy-five cents on the dollar, and scrip certificates for fractional sums less than five hundred ($500) dollars, and that the holders of forty-two thousand five hundred dollars ($42,500) of said Indiana bonds, placed in the hands of said Fosdick, as trustee, the coupons thereof which fell due October 1st, 1873, to April 1st, 1875, inclusive, and received therefor convertible bonds, at seventy-five cents on the dollar, and scrip certificates for fractional sums less than five hundred dollars ($500), and that the total amount of convertible bonds issued for the coupons from the Illinois bonds and the Indiana bonds was the sum of fifty-six thousand dollars ($56,000), and of scrip certificates the sum of three thousand four hundred and seventy-nine dollars and ninety-three cents ($3,479.93);

And it further appearing to the court that thereafter and on or about the 20th of November, 1873, the said railroad company issued to its said bondholders another circular, which proposed the following scheme: That the bondholders should deposit the four coupons, from October 1st, 1873, to April 1st, 1875, inclusive, with complainant, William R. Fosdick, as trustee, and should receive in exchange therefor certificates of indebtedness, payable in five (5) years from February 1st, 1874, with interest payable semi-annually, on the first days of February and August of each year, principal and interest payable in gold, the
196 coupons to be held by the trustee until after the maturity of the certificate of indebtedness on the 1st of February, 1879, when they were to be canceled by said trustee and surrendered to the company; but in case of the non-payment of the interest or the principal of the certificates at maturity, or of the coupons on the first-mortgage bonds between October 1st, 1875, and February 1st, 1879, both inclusive, then the coupons were to be returned to the original owners, upon surrender of the certificates, with all their original rights to proceed against the company unimpaired;

And it further appearing to the court that the holders of one million five hundred and thirty thousand dollars ($1,530,000) of the said Illinois bonds placed in the hands of the said Fosdick as trustee, the four coupons therefrom, mentioned in said circular, and received therefor certificates of indebtedness of said company of the form, tenor, and effect described in said circular, aggregating in amount the sum of two hundred and fourteen thousand two hundred and ten dollars ($214,210,) and that the holders of nine hundred and fifty-seven thousand five hundred dollars ($957,500) of said Indiana bonds, placed in the hands of said Fosdick, as trustee, the four coupons thereof mentioned in said circular, and received therefor certificates of indebtedness of said company to the aggregate amount of one hundred and thirty-four thousand and fifty dollars ($134,050);

And it further appearing to the court that all of the said coupons still remain in the hands of said Fosdick as trustee as aforesaid;

And it further appearing to the court that the semi-annual interest which fell due August 1st, 1874, upon the said convertible bonds and scrip certificates, and certificates of indebtedness so issued as aforesaid, was paid by the said company, and that the semi-annual interest which fell due on the 1st day of February, 1875, on the said convertible bonds, scrip, certificates, and certificates of indebtedness, was duly paid by said company upon all of the same which were presented for payment, which was the first great bulk thereof, and that no interest has been paid on the same or any part thereof since that time;

And it further appearing to the court that the said railroad company at the time of the filing of said bill owned and had in use a large amount of rolling stock upon the said line of railroad in the States of Indiana and Illinois, all of which was and is covered by and described in the said several mortgages, and that of the said rolling stock the portion belonging to the said Illinois division and now in the possession of the receiver appointed in this case, is as follows:

Twenty-five (25) locomotives, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 24, 30, 31, 32, 33, and 34.

Six (6) passenger-cars, numbered 3, 4, 5, 6, 7, and 8.

Three (3) baggage-cars, numbered 2, 3 and 4.

Three (3) mail-cars, numbered 1, 3 and 4.

Eight (8) caboose-cars, numbered 3, 4, 5, 6, 7, 8, 9, and 10.

One hundred and sixty-one (161) box-cars, being those bearing numbers between 564 to 615, both inclusive, and 1,001 to 1,115, both inclusive.

Eighty-five (85) box-cars (Adams), numbered 1,136 to 1,220, both inclusive.

Three hundred and eighteen (318) coal cars, being those bearing numbers between 1 to 109, both inclusive, and between 145 to 376, both inclusive.

One hundred and eighteen (118) block coal cars being those bearing numbers between 01 to 0119, both inclusive.

Thirty-four (34) stock-cars, being those bearing numbers between 501 to 534, both inclusive;

And it further appearing to the court that the said railroad company has paid all of the coupons which became due on the said Illinois and Indiana division bonds, up to and including those which fell due on the first of April, A. D. 1873, and that none of the coupons which have matured since that time have been paid;

And it further appearing to the court that after said railroad company had made default in the payment of the coupons of the said
195 bonds maturing October 1st, 1873, and, to wit, on the 11th day of November, 1873, the said railroad company issued a circular to its bondholders, in and by which it proposed that the holders of bonds should deposit with complainant, William R. Fosdick, as trustee, the coupons due October 1st, 1873, April 1st, 1874, October 1st, 1874, and April 1st, 1875, and receive in exchange therefor the convertible bonds of said railroad company, dated January 1st, 1873, payable February 1st, 1893, bearing interest at seven (7) per cent. per annum, with coupons payable the 1st of February and August of each year, principal and interest in gold; said bonds to bear interest from February 1st, 1874, and to be received by the bondholders at seventy-five (75) per cent. of their par value; also scrip certificates bearing interest the same as the bonds to be issued for fractional sums, and exchangeable for the convertible bonds, when presented in sums of five hundred (500) or one thousand (1,000) dollars; the coupons thus deposited in trust, to be held by the trustee until October 1st, 1876, after which the coupons to be canceled by the trustee and surrendered to the company, but in case of non-payment of any coupons, coming due up to October 1st, 1876, the coupons deposited with the trustee were to be surrendered to the original owners upon the return of the second-mortgage bonds, or scrip certificates which had been issued for them;

And it further appearing to the court that in response to said proposition the holders of two hundred and seventy-one thousand five hundred dollars ($271,500) of said Illinois bonds, placed in the hands of

said Fosdick, as trustee, the coupons thereof, which fell due October 1st, 1873, to April 1st, 1875, inclusive, and received therefor convertible bonds, at seventy-five cents on the dollar, and scrip certificates for fractional sums less than five hundred ($500) dollars, and that the holders of forty-two thousand five hundred dollars ($42,500) of said Indiana bonds, placed in the hands of said Fosdick, as trustee, the coupons thereof which fell due October 1st, 1873, to April 1st, 1875, inclusive, and received therefor convertible bonds, at seventy-five cents on the dollar, and scrip certificates for fractional sums less than five hundred dollars ($500), and that the total amount of convertible bonds issued for the coupons from the Illinois bonds and the Indiana bonds was the sum of fifty-six thousand dollars ($56,000), and of scrip certificates the sum of three thousand four hundred and seventy-nine dollars and ninety-three cents ($3,479.93);

And it further appearing to the court that thereafter and on or about the 20th of November, 1873, the said railroad company issued to its said bondholders another circular, which proposed the following scheme: That the bondholders should deposit the four coupons, from October 1st, 1873, to April 1st, 1875, inclusive, with complainant, William R. Fosdick, as trustee, and should receive in exchange therefor certificates of indebtedness, payable in five (5) years from February 1st, 1874, with interest payable semi-annually, on the first days of February and August of each year, principal and interest payable in gold, the
196 coupons to be held by the trustee until after the maturity of the certificate of indebtedness on the 1st of February, 1879, when they were to be canceled by said trustee and surrendered to the company; but in case of the non-payment of the interest or the principal of the certificates at maturity, or of the coupons on the first-mortgage bonds between October 1st, 1875, and February 1st, 1879, both inclusive, then the coupons were to be returned to the original owners, upon surrender of the certificates, with all their original rights to proceed against the company unimpaired;

And it further appearing to the court that the holders of one million five hundred and thirty thousand dollars ($1,530,000) of the said Illinois bonds placed in the hands of the said Fosdick as trustee, the four coupons therefrom, mentioned in said circular, and received therefor certificates of indebtedness of said company of the form, tenor, and effect described in said circular, aggregating in amount the sum of two hundred and fourteen thousand two hundred and ten dollars ($214,210,) and that the holders of nine hundred and fifty-seven thousand five hundred dollars ($957,500) of said Indiana bonds, placed in the hands of said Fosdick, as trustee, the four coupons thereof mentioned in said circular, and received therefor certificates of indebtedness of said company to the aggregate amount of one hundred and thirty-four thousand and fifty dollars ($134,050);

And it further appearing to the court that all of the said coupons still remain in the hands of said Fosdick as trustee as aforesaid;

And it further appearing to the court that the semi-annual interest which fell due August 1st, 1874, upon the said convertible bonds and scrip certificates, and certificates of indebtedness so issued as aforesaid, was paid by the said company, and that the semi-annual interest which fell due on the 1st day of February, 1875, on the said convertible bonds, scrip, certificates, and certificates of indebtedness, was duly paid by said company upon all of the same which were presented for payment, which was the first great bulk thereof, and that no interest has been paid on the same or any part thereof since that time;

And it further appearing to the court that the amount of interest paid as aforesaid, August 1st, 1874, upon the said coupons so funded as aforesaid, for which scrip certificates, or certificates of indebtedness had been issued as aforesaid, was the sum of one dollar and twenty-two and one-half cents ($1.22½) in gold upon each coupon, and that the same amount per coupon was paid upon all of the scrip, certificates, and certificates of indebtedness presented for payment February 1st, 1875, and thereafter, and that each of said coupons so funded as aforesaid, for which the said convertible bonds were received at seventy-five cents on the dollar as aforesaid, and upon which said semi-annual interest was paid as aforesaid, August 1st, 1874, received a payment of one dollar and sixty-three and one-third cents ($1.63⅓) in gold per coupon, and that the same amount per coupon was paid on all of said convertible bonds issued in lieu of funded coupons, which were presented for payment February 1st, 1875, and thereafter;

197 And it further appearing to the court that of the said twenty-five hundred Illinois bonds there is outstanding the sum of six hundred and ninety-eight thousand five hundred dollars ($698,500) thereof, from which the said four coupons falling due October 1st, 1873, to April 1st, 1875, inclusive, have never been funded under either of the schemes aforesaid, and upon which coupons no payments whatever have been made since the payment of the coupon due April 1st, 1873, and that of the said fifteen hundred Indiana bonds there is outstanding the sum of five hundred thousand dollars ($500,000), from which the said four coupons falling due October 1st, 1873, to April 1st, 1875, inclusive have never been funded under either of the schemes aforesaid, and upon which no payments whatever have been made since the payment of the coupon which fell due April 1st, 1873;

And it further appearing to the court that in and by the said trust-deeds, and each of them, it was and is, among other things, provided that if default should be made by the said railroad company in the payment of any half-year's interest on any of said bonds in said several trust-deeds described, and the warrant or coupon for such interest shall have been presented, and its payment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all of the said bonds by said trust-deeds severally secured should be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said trustees might so declare the same, and notify the said railroad company thereof, and upon the written request of the holders of a majority of the said bonds then outstanding, should proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property or otherwise:

And it further appearing to the court that heretofore, and on the 26th day of February, A. D. 1875, the said complainants, as trustees under the said mortgage or trust-deed to them, dated March 10th, 1869, did declare the principal of the said twenty-five hundred Illinois division bonds to be due and payable by reason of the default of said railroad company in the payment of certain of the coupons of said bonds which fell due October 1st, 1873, payment of which had been duly demanded, and the continuance of such default for more than six months after such demand;

And it further appearing to the court that in and by said trust-deeds, and each of them, it was and is, among other things, provided that in case of sale of the property, railroad, and franchises, in said trust-deeds severally described, the purchase-money should be applied as follows:

After deducting from the proceeds of such sale the expenses of the sale and conveyance, and all advances or liabilities which may have been made or incurred by the said trustees in operating and con-
195 trolling and maintaining the said railroad and property, and in managing its business and affairs while in possession, and all payments for taxes, charges, and assessments on said premises, or any part thereof, as well as reasonable compensation for their own services, to apply the proceeds of such sale to the payment of the interest of said two millions and five hundred thousand dollars of bonds, or so many of them as shall have been issued by said party of the first part, and be then outstanding, pro rata, until all such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds, pro rata, until such principal shall be paid; and if any surplus remain after paying all of said matters, to pay such surplus to the party of the first part;

And it further appearing to the court that upon the bill filed in this cause, and in pursuance of the prayer therein of the said complainants as trustees, a receiver has been heretofore appointed by this court, and that all of the property, railroad, and franchises within the State of Illinois, and in the said several mortgages or trust-deeds described, has been taken possession of by such receiver, under the order of this court, and has been since that time managed, controlled, operated, and held possession of by him under the orders of this court;

And it further appearing to the court that there is now due and owing by the said defendant, the Chicago, Danville and Vincennes Railroad Company, to the said complainants, as trustees in the said Illinois division mortgage-deed:

First. The sum of eighty-seven thousand five hundred dollars ($87,500), in gold coin, for the coupons of the said twenty-five hundred (2,500) Illinois division bonds, which fell due on the 1st day of October, A. D. 1873, with interest thereon from and after the said last-mentioned day at the rate of six (6) per cent. per annum, in gold, less such sums as have heretofore been paid upon certain of said coupons under the funding arrangements hereinbefore set forth;

Second. In the further sum of eighty-seven thousand five hundred dollars ($87,500), in gold coin, for the coupons of the said Illinois division bonds, which fell due on the 1st day of April, A. D. 1874, with interest thereon from and after the said last-mentioned day at six per cent. per annum, in gold, less such sums as have heretofore been paid upon certain of said coupons under the funding arrangements hereinbefore stated;

Third. In the further sum of eighty-seven thousand five hundred dollars ($87,500), in gold coin, for the coupons of the said Illinois division bonds, which fell due on the 1st day of October, A. D. 1874, with interest from and after said last-mentioned day at six per cent. per annum, in gold, less such sums as have heretofore been paid upon certain of said coupons under said funding schemes;

Fourth. In the further sum of eighty-seven thousand five hundred dollars ($87,500), in gold coin, for the coupons of the said Illinois division bonds, which fell due on the 1st day of April, A. D. 1875,
199 with interest from and after the said last-mentioned day at six per cent. per annum, in gold, less such sums as have heretofore been paid upon certain of said coupons under said funding schemes;

Fifth. In the further sum of eighty-seven thousand five hundred dollars ($87,500), in gold coin, for the coupons of the said Illinois division bonds, which fell due on the 1st day of October, A. D. 1875, with

interest thereon from and after said last-mentioned day at the rate of six per cent. per annum, in gold;

Sixth. In the further sum of eighty-seven thousand five hundred dollars ($87,500), in gold coin, for the coupons of the said Illinois division bonds, which fell due on the 1st day of April, A. D. 1876, with interest thereon from and after said last-mentioned days at the rate of six (6) per cent. per annum, in gold;

Seventh. In the further sum of eighty-seven thousand five hundred dollars ($87,500), for the coupons of the Illinois division bonds, which fell due on the 1st day of October, A. D. 1876, with interest thereon from and after said last-mentioned day, at the rate of six (6) per cent. per annum, in gold;

Eighth. And in the further sum of two million five hundred thousand dollars ($2,500,000), in gold coin, for the principal of the said Illinois division bonds, so declared to be due as aforesaid, together with interest thereon from and after the first day of October, A. D. 1876, at the rate of seven (7) per cent. per annum, in gold;

And that the said several sums of money, with the interest thereon, are due and owing in the order in which they are hereinbefore stated and set forth:

Now, therefore, it is hereby ordered, adjudged, and decreed that the said defendant, the Chicago, Danville & Vincennes Railroad Company, pay, or cause to be paid, to the said complainants, as trustees for the holders of the said Illinois division bonds and coupons, the said several sums of money, with interest thereon, as hereinbefore found to be due and owing, within twenty (20) days from and after the entry of this decree, and in default thereof, that all of the said railroad, premises, property, and franchises, described in the said trust-deed, dated March 10th, A. D. 1869, and hereinbefore described as the Illinois division of said railroad, together with all the rights, franchises, property, and appurtenances thereof, and the rolling-stock thereto belonging, and herein particularly scheduled and set forth, and all the contract-rights of said company for the use of tracks of other railroads between Thornton and Chicago, and all other rights, privileges, and appurtenances of the said Illinois division of said railroad, as the same is hereinafter specifically scheduled, and all the right, title, interest, and equity of redemption of the said Chicago, Danville & Vincennes Railroad Company therein, shall be sold as an entirety by Henry W. Bishop, the master in chancery of this court, at public auction, to the highest and best bidder for cash therefor, payable as hereinafter provided, at the west door of the Republic Life-Insurance Company building, in the city of Chicago, in the State of Illinois, after having first given notice of the time and place, and terms of sale, and a description of the property to be sold by
200 advertisement thereof in some public newspaper published in the city of Chicago, for the space of thirty (30) days prior to such day of sale.

The terms of such sale shall be as follows:

Twenty-five (25) per cent. of the purchase-money to be paid to said master in chancery in cash, at the time of sale. One-half of the balance of the purchase-money to be paid to said master, in cash, within three months from the day of sale, and the remainder to be paid to said master, in cash, within six months from said day of sale.

And it is further ordered, adjudged, and decreed that the said master make report of said sale to this court, and that upon confirmation thereof, and the full payment of the whole of the purchase-money, that the said Bishop, as master in chancery of this court, shall convey to the pur-

chaser or purchasers, at such sale, all of the said railroad, premises, property, appurtenances, and franchises sold, by a good and sufficient deed therefor, which said deed, when so made and delivered, shall vest in the grantee all the right, title, estate, interest, property and equity of redemption of the said railroad company, of, in, and to the said railroad, property, premises, appurtenances, and franchises in fee-simple forever, and shall entitle said grantee to the possession thereof, and shall be a perpetual bar, both in law and equity, against any and every claim of the said railroad company, and its successors or assigns, and against all and every person or corporation claiming, or to claim, the said railroad, premises, property, appurtenances, and franchises, or any part thereof, under or through the said railroad company forever.

And it is further ordered, adjudged, and decreed that the receiver heretofore appointed in said cause, and now in possession of the said railroad, property, premises, appurtenances, and franchises, shall, upon presentation to him of the said deed, deliver to the grantee or grantees therein named, all the railroad, property, premises, appurtenances, and franchises therein described.

And it is further ordered, adjudged, and decreed that in case the purchaser or purchasers at such sale shall fail to make prompt payment of the whole of said purchase-money, according to the terms and conditions of sale, as hereinbefore specified, the said master shall report the same to the court, and thereupon the said sale shall be null and void, and the said purchaser shall of the said purchase-money forfeit an amount equal to the sums of money disbursed by said master out of said purchase-money, under the provisions of this decree, not including the amount paid over to the clerk of this court under the provisions of this decree.

And it is further ordered, adjudged, and decreed that the said master shall, out of the proceeds of such sale,

First. Pay all the costs of said suit, and the costs and expenses of such sale, including the fees of said master;

201 Second. Pay all expenses and compensation of the said complainants, as trustees of the said bond and coupon holders, including attorneys' fees incurred in the course of their trust, and in the prosecution or defense of any and all suits brought by or against them, as trustees, which shall be allowed by or under the order of this court, and also all other costs and attorneys' fees which shall be allowed by or under the order of this court, in favor of the parties to this suit, or intervening petitioners therein;

Third. Pay the balance to the clerk of this court.

And it is further ordered, adjudged, and decreed that the said William R. Fosdick, on or before the confirmation of said sale, deliver to the clerk of this court all of the said Illinois Division coupons deposited with him as trustee as aforesaid, for which either convertible bonds, scrip certificates, or certificates of indebtedness have been issued under the funding schemes hereinbefore set forth, with a full statement of the names of the depositors of the said several coupons, and the new obligations of said company issued therefor, so far as the same is within the knowledge of said Fosdick; and that the clerk of said court shall, upon receipt thereof, deliver to said Fosdick a certified copy of this decree, with an endorsement thereon, stating the receipt of said coupons by him, and the said Fosdick shall be thereupon released from any further duty or liability as trustee of said coupons.

And it is further ordered, adjudged and decreed that the said clerk, out of the moneys so paid to him by said master, as aforesaid, shall,

First. Pay all the liabilities of the Illinois Division of said railroad incurred by the receiver in this cause, by or under the order of this court, including the compensation of said receiver, and all claims against said railroad company which said receiver has been or shall be required to pay by order of this court, which shall remain unpaid after the application thereto of all moneys in the hands of said receiver, at the time of the confirmation of the sale hereinbefore provided for;

Second. Out of the surplus, said clerk shall pay in gold, pro rata, the coupons of said Illinois Division bonds which fell due October 1st, 1873, with interest from that date to the day of sale, at the rate of six per cent. per annum, after having first applied on all the funded coupons the moneys received thereon, severally, under said funding schemes, as of the date when such payments were made;

Third. Said clerk shall, out of the surplus, if any, pay in gold, pro rata, the coupons of said Illinois Division bonds which fell due April 1st, 1874, with interest from that date to the day of sale, at the rate of six per cent. per annum, after having first applied on all the funded coupons the moneys received thereon, severally, under said funding schemes, as of the date when such payments were made;

Fourth. Out of the surplus, if any, said clerk shall pay in gold, pro rata, the coupons of said Illinois Division bonds which fell due
202 October 1st, 1874, with interest from that date to the day of sale, at the rate of six per cent. per annum, after having first applied on all of the funded coupons the moneys received thereon, severally, under said funding schemes, as of the date when such payments were made;

Fifth. Out of the remaining surplus, if any, the said clerk shall pay in gold, pro rata, the coupons of said Illinois Division bonds which fell due April 1st, 1875, with interest from that date to the day of sale, at the rate of six per cent. per annum, after having first applied on all the funded coupons the moneys received thereon, severally, under said funding schemes, as of the date when such payments were made;

Sixth. Out of the remaining surplus, if any, said clerk shall pay in gold, pro rata, the coupons of said Illinois Division bonds which fell due October 1st, 1875, with interest from that date to the day of sale, at the rate of six per cent. per annum;

Seventh. Out of the remaining surplus, if any, the said clerk shall pay in gold, pro rata, the coupons of said Illinois Division bonds which fell due April 1st, 1876, with interest from that date to the day of sale, at the rate of six per cent. per annum;

Eighth. Out of the remaining surplus, if any, the said clerk shall pay in gold, pro rata, the coupons of the said Illinois Division bonds which fell due October 1st, 1876, with interest from that date to the day of sale, at the rate of six per cent. per annum;

Ninth. Out of the remaining surplus, if any, the said clerk shall pay in gold, pro rata, all of the said Illinois Division bonds, with interest from the said first day of October, A. D. 1876, to the day of sale, at the rate of seven per cent. per annum.

Tenth. If any surplus shall remain after deducting from the amount paid by said master to said clerk the aggregate of all the payments hereinbefore directed to be made by said clerk, the said clerk shall report the same to the court for further order in this behalf.

Schedule of premises and property to be sold by Henry W. Bishop, as master in chancery, as hereinbefore provided.

1. The main line of the Chicago, Danville and Vincennes Railroad,

from Dalton, in the county of Cook, southerly to Danville, in the county of Vermillion, a distance of one hundred and eight (108) miles; and a branch line from Bismarck, in said Vermillion County, southeasterly to the east line of the State of Illinois, a distance of four and six-tenths ($4\frac{6}{10}$) miles, together with the right of way, station and other grounds, grading, bridges, culverts, tracks, shops, including fixtures and tools, stations, and other buildings and structures, fences, and appurtenances thereof, and all wood, coal, and other supplies for the use and operation thereof.

203 2. The contract rights of the said Chicago, Danville and Vincennes Railroad Company in the use of the tracks and appurtenance of the Chicago and Southern Railroad Company, and the tracks and appurtenances of the Pittsburgh, Cincinnati and S't Louis Railway Company from Thornton, in Cook County, to and into the city of Chicago.

3. The terminal tracks, sidings, switches, and appurtenances of said Chicago, Danville and Vincennes Railroad Company at and near said city of Chicago, whether the same are situate on the grounds and rights of way of said company, or otherwise, aggregating a length of seven and eight tenths ($7\frac{8}{10}$) miles, together with all rights of way or contracts therefor, or rights to have and maintain such tracks, or any part thereof, and all buildings, structures, erections and appurtenances thereof, including a water-tank, and an undivided interest in an engine-house of fourteen (14) stalls situate on grounds of the said Chicago and Southern Railroad Company, adjacent to the city of Chicago, and all wood, coal, and other supplies, tools and fixtures, for the use of said Chicago, Danville and Vincennes Railroad Company, and situate or used within said city of Chicago, or along the line of said Chicago and Southern Railroad Company, or said Pittsburgh, Cincinnati and S't Louis Railway Company, north of said Thornton.

4. The south eighteen (18) feet of lot twelve (12), and lots thirteen (13) and sixteen (16), in block thirteen (13), and lot six (6) in block nine (9), Carpenter's Addition to Chicago; also lot twenty-four (24) in block seven (7), Carpenter's Addition to Chicago, subject to a lien of about twenty-five hundred (2,500) dollars.

Lots twenty-nine (29), thirty (30), and thirty-two (32), and a leasehold interest in lot thirty-one (31), all in block four (4), Magie & High's Addition to Chicago, with the tracks and buildings and fixtures thereon, said lots twenty-nine (29), thirty (30), and thirty-two (32) being subject to a first lien of about twenty-three hundred dollars ($2,300).

5. Twenty-five (25) locomotives numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 24, 30, 31, 32, 33, and 34.

Six (6) passenger-cars, numbered 3, 4, 5, 6, 7, and 8.

Three (3) baggage-cars, numbered 2, 3, and 4.

Three (3) mail-cars, numbered 1, 3, and 4.

Eight (8) caboose cars, numbered 3, 4, 5, 6, 7, 8, 9, 10.

One hundred and sixty-one (161) box cars, being those bearing numbers between 564 to 615 both inclusive, and 1,001 to 1,115, both inclusive.

Eighty five (85) box-cars (Adams), being those bearing numbers between 1,136 to 1,220, both inclusive.

Three hundred and eighteen (318) coal-cars, being those bearing numbers between 1 to 100, both inclusive, and 145 to 376, both inclusive.

One hundred and eighteen (118) block coal-cars, being those bearing numbers between 01 to 0118, both inclusive.

204 Thirty-four (34) stock-cars, being those bearing numbers between 501 to 534, both inclusive.

6. All of the franchises of the said Chicago, Danville and Vincennes Railroad Company within the State of Illinois, and all of the property and premises within said State other than that in this schedule specifically described in which the said railroad company has any interest, held by it for use in the maintenance and operation of the said line of railroad.

And the defendants, The Chicago, Danville, and Vincennes Railroad Company and James W. Elwell, and each for itself and himself, separately pray an appeal from the whole of said decree to the Supreme Court of the United States, which the court doth grant upon the filing of a bond, within sixty days from the entry hereof, in the sum of fifteen hundred dollars, with surety to be approved by the court.

And it is further ordered that upon said defendants filing of a bond, with sureties to be approved by the court as aforesaid, in the penal sum of five hundred thousand dollars, that the filing of said bond shall operate as a supersedeas, and all further proceedings under said decree be stayed, as by the law in such cases provided.

205 Afterwards, to wit, on the 14th day of December, A. D. 1876, in the record of the proceedings of said court in said-entitled cause before the Hon. Thomas Drummond, judge, is the following entry, to wit:

WILLIAM R. FOSDICK AND JAMES D. FISH
v.
THE CHICAGO, DANVILLE, AND VINCENNES Railroad Company et al. } In chancery.

In the matter of the intervening petition of the Hinkley Locomotive Works of Boston, Mass.

This day came on to be heard the said intervening petition of the Hinkley Locomotive Works of Boston, Massachusetts, and thereupon, on reading the report of Henry W. Bishop, esq., master in chancery, by consent of counsel for the complainants and the defendant railroad company, on motion of R. Biddle Roberts, solicitor for said intervening petitioners, the court finds that there is due the said intervening petitioners from said railroad company, for use of and repairs to locomotives, the sum of fifteen thousand seven hundred and ninety-three dollars and seventy-five cents; and it is thereupon ordered, adjudged, and decreed that Adna Anderson, the receiver appointed herein, pay to the said Hinkley Locomotive Works or its solicitor, on receipt of
206 either, the said sum of fifteen thousand seven hundred and ninety-three dollars and seventy-five cents, out of any moneys that may be in his hands as such receiver, and that he make such payment as soon as the same can be done consistently with the proper operation of the said road and the payment of claims heretofore allowed.

207 Afterwards, to wit, on the 5th day of January, A. D. 1877, the intervening bondholders filed in said clerk's office their objections to the allowance of the claim, and their motion to set aside the order on the claim of said Hinckley Locomotive Works in said entitled cause, which said objections and motion are respectively in the words and figures following, to wit:

208 United States circuit court, northern district of Illinois.

W'm R. Fosdick and James D. Fish
vs.
Chicago, Danville & Vincennes R. R. Co. } In chancery.

Intervening petition of the Hinckley Locomotive Works.

Objections of intervening bondholders to the allowance of the claim of the Hinckley Locomotive Works.

1st. That the said claim is in the nature of a mere claim for money due upon an account closed before the appointment of a receiver for the said railroad company.

2d. That the said claim does not come within the provisions or meaning of the lien-laws of the State of Illinois.

3d. That the said claim did not accrue to the said Hinckley Locomotive Works within six months next preceding the appointment of a receiver for the said railroad company.

4. That the bondholders, under the mortgage to said Fosdick and Fish, trustees, have a paramount and prior lien upon the earnings of the said road, and upon the proceeds of the sale of the said rail-
209 road property, and that the claim of the said Hinckley Locomotive Works, even if a lien upon the earnings or proceeds, is inferior to the lien of the said bondholders, and should be postponed until after the satisfaction of the same.

CRAWFORD & McCONNELL.
For Intervening Bondholders.

(Endorsed:) Filed Jan'y 5, 1877. W'm H. Bradley, cl'k.

210 United States circuit court, northern district of Illinois.

William R. Fosdick & James D. Fish
vs.
Chicago, Danville & Vincennes Railroad Company.

Intervening petition of the Hinckley Locomotive Works.

Now come the intervening bondholders, Stephen W. Osgood, F. W. , & others, by their counsel, Crawford & McConnell, and move the court to set aside the order heretofore entered on the 14th day of December, 1876, in and by which the receiver of the said Chicago, Danville & Vincennes Railroad Company was directed to pay the said Hinckley Locomotive Works the sum of fifteen thousand hundred and ninety-three and $\frac{75}{100}$ dollars out of money in his hands as such receiver.

CRAWFORD & McCONNELL,
For said Intervening Bondholders.

JAN. 5TH, 1877.

(Endorsed:) Filed Jan'y 5, 1877. W'm H. Bradley, cl'k.

211 Afterwards, to wit, on the 26th day of February, A. D. 1877, an affidavit was filed in said clerk's office, in the words and figures following, to wit:

Affidavit.

Circuit court of the United States, northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH
agst
THE CHICAGO, DANVILLE AND VINCENNES Railroad Co.

U. S. OF AMERICA,
Northern District of Ill's, ss:

F. W. Huidekoper, on oath, says that he is one of the intervening bondholders, who are petitioners in this cause, and is also one of the purchasers of the property at the master's sale.

Affiant says that he has fully examined the claim of the Hinckley Locomotive Works, and verily believes that the allowance made to it is more than double what it is entitled to under any rule of decision which this court has laid down for the allowance of such claims, that such allowance was not made on the basis of the master's report, and is not supported by any testimony reported by the master, but is based exclusively on the consent stated in the allowance, and such consent-order was not agreed to in any way by the counsel of the bondholders,
212 who never had any notice of such matter until after the order was entered without notice to them. Affiant verily believes that on a re-reference the said claim will be either wholly disallowed or greatly reduced.

Affiant further says that in July, 1876, without any notice to such bondholders, or their counsel, the receiver filed a petition and procured the entry of an order allowing him to pay or settle certain scheduled claims.

Among such claims are the following:

Nebeker and Cambrun	1,046 50
J. E. Young	825
A. T. Chur	2,577 07
City Bank of Ottawa	5,000
Marine B'k	528 68
J. W. Elwell	421 04
J. D. Fish	421 04

Affiant says that none of said claims are entitled to be paid out of the earnings of said road prior to the first-mortgage bonds, and that none of them come within the rule of allowance laid down by the court. That the claims of J. E. Young, the Marine Bank, J. W. Elwell, and J. D. Fish, are, as this affiant believes, fictitious and fraudulent, and the claims of Chur and the City Bank of Ottawa are merely money loans not entitled to any lien at all. Affiant shows that such claims have never
213 been in the master's office, and that without an order of court referring them to a master affiant will have no opportunity to contest either their validity or amount.

Affiant therefore prays that the court will set aside any allowance as to each and every of such claims, and refer them to the master to report, and give the bondholders an opportunity to be heard on such reference.

F. W. HUIDEKOPER.

Sworn and subscribed this 26th of Feb'y, 1877.

H. W. BISHOP,
U. S. Com'r.

(Endorsed:) Filed February 26, 1877. W'm H. Bradley, clerk.

213½ Afterwards, to wit, on the 16th day of April, A. D. 1877, in the record of proceedings of said court in said entitled cause, before the Hon. Thomas Drummond, judge, is the following order, to wit:

WILLIAM R. FOSDICK AND JAMES D. FISH
vs.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company et al. } In chancery.

The report of Henry W. Bishop, esq., master in chancery, having been filed, reporting the surrender to him of two thousand three hundred and twenty-eight (2,328) bonds, and the coupons and certificates in said report mentioned, and the form and execution by him of a deed to Frederic W. Huidekoper, Thomas W. Shannon, and John M. Denison, in pursuance of a decree entered in this cause on December fifth, A. D. 1876, and the further order or decree of this court entered herein on the twelfth day of April, A. D. 1877, and the said report having been examined and also said deed presented therewith, the said report and deed are hereby confirmed and approved, together with the reception by said master of the bonds, coupons, and certificates in said report mentioned, also approved and confirmed.

And the said deed is ordered to be entered of record, and is as follows, to wit:

214 This indenture, made the twelfth day of April, in the year of our Lord one thousand eight hundred and seventy-seven, between Henry W. Bishop, as master in chancery of the circuit court of the United States for the northern district of Illinois, party of the first part, and Frederic W. Huidekoper, Thomas W. Shannon, and John M. Denison, parties of the second part, witnesseth:

That whereas, by a decree duly entered of record on the fifth day of December, A. D. 1876, it was ordered, adjudged, and decreed by the circuit court of the United States for the northern district of Illinois, in a certain action therein pending, wherein William R. Fosdick and James D. Fish were complainants and the Chicago, Danville and Vincennes Railroad Company and others were defendants, that the Chicago, Danville and Vincennes Railroad Company should, within twenty days thereafter, pay or cause to be paid to William R. Fosdick and James D. Fish, as trustees for first-mortgage bondholders, the certain sums of money which by said decree were adjudged to be due to such trustees, under a certain mortgage or deed of trust made, executed, and delivered by said company on the 10th day of March, A. D. 1869, and on the bonds issued thereunder; and it was further decreed that all of the said railroad property, premises, and franchises described in said mortgage or deed of trust, together with all the rights, franchises, property, and appurtenances thereof, and the rolling-stock thereto belonging, and hereinafter particularly scheduled and set forth, and all the right, title, interest, and equity of redemption of said Chicago, Danville and Vincennes Railroad Company, should be sold as an entirety by Henry W. Bishop, the master in chancery of said circuit court of the United States, at public auction, to the highest and best bidder therefor, on the terms
215 specified in said decree, at the west door of the Republic Life-Insurance Company building, in the city of Chicago, in the State of Illinois, after having first given notice of the time and place and terms of sale, and a description of the property to be sold, by advertisement thereof in some public newspaper published in the city of Chicago for the space of thirty days prior to such day of sale;

And whereas the said Chicago, Danville and Vincennes Railroad Company failed to pay the said sum of money adjudged by said decree as aforesaid to be due within the time ordered, and thereupon the said master in chancery, after having given due notice of the time, place, and terms of sale, and a description of the property to be sold, in accordance with the directions of the said decree, did, on the seventh day of February, A. D. 1877, offer for sale at public auction the said property, in pursuance of said notice, and thereupon Frederic W. Huidekoper, Thomas W. Shannon, and John M. Denison became the highest bidders therefor, at the sum of one million four hundred and fifty thousand dollars in gold, and were thereupon declared the purchasers thereof by said master; and the sale and bid having been reported by said master in chancery to the said court, and the said sale having been in all things confirmed by the said court, and the purchasers having fully complied with the terms of such decree, and the further decree of said court, dated April 12th, A. D. 1877, as to payments, and the said master having been ordered by the said further decree of said court to execute and deliver to such purchasers a conveyance of said property so sold and purchased by them as aforesaid:

Now, therefore, this indenture witnesseth that the said Henry W. Bishop, master in chancery of the circuit court of the United States for the northern district of Illinois, party of the first part, in order to carry into effect the said sale, so made as aforesaid, and in execution of the orders and decrees of said court requiring him to execute and deliver such conveyance, and in consideration of the premises and of the
216 payments made by the said parties of the second part, in accordance with the orders of the court, has sold, and by these presents does sell and convey, unto the said Frederick W. Huidekoper, Thomas W. Shannon, and John M. Denison, parties of the second part, all and singular—

The main line of the Chicago, Danville and Vincennes Railroad from Dalton, in the county of Cook, southerly to Danville, in the county of Vermillion, a distance of one hundred and eight (108) miles; and a branch line from Bismarck, in said Vermillion County, southeasterly to the east line of the State of Illinois, a distance of four and six-tenths (4⅘) miles, together with the right of way, station and other grounds, grading, bridges, culverts, tracks, shops, including fixtures and tools, stations and other buildings and structures, fences, and appurtenances thereof, and all wood, coal, and other supplies for the use and operation thereof.

The contract rights of the said Chicago, Danville and Vincennes Railroad Company to the use of the tracks and appurtenances of the Chicago and Southern Railroad Company, and the tracks and appurtenances of the Pittsburgh, Cincinnati and S't Louis Railway Company from Thornton, in Cook County, to and into the city of Chicago.

The terminal tracks, sidings, switches, and appurtenances of said Chicago, Danville and Vincennes Railroad Company at and near said city of Chicago, whether the same are situate on the grounds and rights of way of said company or otherwise, aggregating a length of seven and eight-tenths (7⅘) miles, together with all rights of way or contracts therefor, or rights to have and maintain such tracks, or any part thereof, and all buildings, structures, erections, and appurtenances thereof, including a water-tank, and an undivided interest in an engine-house of fourteen (14) stalls situate on grounds of the said Chicago and Southern Railroad Company, adjacent to the city of Chicago, and all wood, coal, and other supplies, tools and fixtures, for the use of said Chicago, Danville

217 and Vincennes Railroad Company, and situate or used within said city of Chicago, or along the line of said Chicago and Southern Railroad Company, or said Pittsburgh, Cincinnati and S't Louis Railway Company, north of said Thornton.

The south eighteen (18) feet of lot twelve (12), and lots thirteen (13) and sixteen (16) in block thirteen (13), and lot six (6) in block nine (9), Carpenter's addition to Chicago; also lot twenty-four (24) in block seven (7), Carpenter's addition to Chicago, subject to a lien of about twenty-five hundred (2,500) dollars.

Lots twenty-nine (29), thirty (30), and thirty-two (32), and a leasehold interest in lot thirty-one (31), all in block four (4), Magie & High's addition to Chicago, with the tracks and buildings and fixtures thereon, said lots twenty-nine (29), thirty (30) and thirty-two (32) being subject to a first lien of about twenty-three hundred dollars ($2,300).

Twenty-five (25) locomotives, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 24, 30, 31, 32, 33, and 34.

Six (6) passenger-cars, numbered 3, 4, 5, 6, 7, and 8.

Three (3) baggage-cars, numbered 2, 3, and 4.

Three (3) mail-cars, numbered 1, 3, and 4.

Eight (8) caboose-cars, numbered 3, 4, 5, 6, 7, 8, 9, and 10.

One hundred and sixty-one (161) box-cars, being those bearing numbers between 564 to 615, both inclusive, and 1001 to 1115, both inclusive.

Eighty-five (85) box-cars (Adams'), being those bearing numbers between 1136 to 1220, both inclusive.

Three hundred and eighteen (318) coal-cars, being those bearing numbers between 1 to 100, both inclusive, and 145 to 376, both inclusive.

One hundred and eighteen (118) block-coal cars, being those bearing numbers between 01 to 0118, both inclusive.

Thirty-four (34) stock-cars, being those bearing numbers between 501 to 534, both inclusive.

All of the franchises of the said Chicago, Danville and Vin-
218 cennes Railroad Company within the State of Illinois, and all of the property and premises within said State other than that in this schedule specifically described, in which the said railroad company has any interest, held by it for use in the maintenance and operation of the said line of railroad.

To have and to hold the said property with the appurtenances, rights, and franchises, and each and every part thereof, so sold and hereinbefore described, unto the said Frederick W. Huidekoper, Thomas W. Shannon, and John M. Denison, their heirs and assigns. Meaning and intending hereby to convey to the said parties of the second part the above-described premises and franchises as fully and completely as the said party of the first part, the said master in chancery, by virtue of the said several decrees and orders of said circuit court, reference being hereby had thereto, can or could sell and convey the said premises, property, and franchises, subject to all taxes.

In witness whereof the said Henry W. Bishop, as master in chancery aforesaid, has hereunto set his hand and seal the day and year first above written.

HENRY W. BISHOP, [SEAL.]
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

219, 220 STATE OF ILLINOIS,
Cook County, ss:

I, Edmund Gorvett, a notary public in and for said county, in the State aforesaid, do hereby certify that Henry W. Bishop, who is personally known to me to be the same person whose name is subscribed to the annexed deed of conveyance, appeared before me this day, in person, and acknowledged that he, as master in chancery of the circuit court of the United States for the northern district of Illinois, had signed, sealed, and delivered the said instrument of writing, as his free act and deed for the uses and purposes therein expressed.

Given under my hand and notarial seal this twelfth day of April, A. D. 1877.

[SEAL.] EDMUND GARRETT,
Notary Public.

221, 222 Afterwards, to wit, on the 28th day of April, A. D. 1877, in the record of the proceedings of said court in said entitled cause before the Hon. Thomas Drummond, judge, is the following entry, to wit:

WILLIAM R. FOSDICK AND JAMES D. FISH
v.
CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY et al. } In chancery.

In the matter of the intervening petition of The Hinkley Locomotive Works.

This day came on to be heard the motion heretofore entered in said cause by F. W. Huidekoper and others in January fifth, A. D. 1877, to set aside and vacate the order of December fourteenth, A. D. 1876, allowing the claim of the Hinkley Locomotive Works, and was argued by counsel, Mess'rs Lawrence, Campbell and Lawrence appearing for complainants, E. Walker, esq., for defendants, Mess'rs Crawford and McConnell for the said intervening bondholders, and R. Biddle Roberts, esq., for said intervening petitioner, and the court being fully advised in the premises and being satisfied that the original order was rightly
223 entered on the merits doth overrule said motion and direct that said sum of fifteen thousand seven hundred ninety-three dollars and seventy-five cents ($15,793.75) be paid out of the funds in this court.

To which ruling of the court the said intervening bondholders, by their counsel, except, and pray an appeal to the Supreme Court of the United States from this order and from the order of December fourteenth, A. D. 1876, which is granted on condition that they do file a good and sufficient bond, with surety to be approved by the court, in the sum of twenty-five thousand dollars, conditioned according to law.

224 Afterwards, to wit, on the 2d day of June, A. D. 1877, the purchasers of said road filed in said clerk's office their appeal-bond in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal-bond.

Know all men by these presents, that we, Frederic W. Huidekoper, Thomas W. Shannon, John M. Denison, George W. Gill, Alanson A. Sumner, Chandler Robbins, and William T. Hickok, as principals, and Arthur B. Meeker, as sureties, are held and firmly bound unto the

Hinckley Locomotive Works in the penal sum of twenty-five thousand dollars lawful money of the United States, for the payment of which said sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this day of May, A. D. 1877.

The condition of the above obligation is such that whereas a certain decretal order or decree was entered on the 14th day of December, 1876, in a cause pending in the United States circuit court for the northern district of Illinois, wherein William R. Fosdick and James D.
225 Fish were complainants, and the Chicago, Danville and Vincennes Railroad Company and James W. Elwell were defendants, directing the receiver of said railroad company, on the petition of the said Hinckley Locomotive Works, to pay from the funds in his hands not otherwise appropriated to the said Hinckley Locomotive Works the sum of fifteen thousand seven hundred and ninety-three $^{75}/_{100}$ dollars;

And whereas exception was taken to the said payment by the intervening bondholders, Frederick W. Huidekoper, Thomas W. Shannon, John M. Dennison, George W. Gill, Alanson A. Sumner ,Chandler Robbins, and William T. Hickok, and motion entered in said cause in their behalf to vacate the said decree, which exceptions and motion were overruled by said court on April 28th, 1877, and an additional decree or decretal order entered on said last-named day directing the payment of said sum out of the fund in said cause as originally directed by the order of December 14, 1876; and whereas the said intervening bondholders have prayed for and been allowed an appeal to the Supreme Court of the United States from both said decretal orders:

226 Now, if said appeal is prosecuted with effect, the above obligation is to become null and void; otherwise, to remain in full force.

F. W. HUIDEKOPER. [SEAL.]
JNO. M. DENISON. [SEAL.]
THO'S W. SHANNON. [SEAL.]
GEORGE W. GILL. [SEAL.]
ARTHUR B. MEEKER. [SEAL.]

STATE OF MASSACHUSETTS,
City of Worcester, County of Worcester:

George W. Gill, on oath, says he is fairly worth at least the sum of fifty thousand dollars over and above his just debts and liabilities.

GEO. W. GILL.

Subscribed and sworn to before me this 28th day of May, 1877.
Witness my hand and official seal the day and year aforesaid.
[SEAL.] J. HENRY HILL,
Notary Public.

STATE OF NEW YORK,
City and County of New York:

Darius R. Mangam, on oath, says he is fairly worth the sum of thousand dollars over and above all his just debts and liabilities.

Subscribed and sworn to before me this day of May, 1877.
227 Witness my hand and official seal the day and year aforesaid.

STATE OF ILLINOIS,
County of Cook, ss:

Arthur B. Meeker, being first duly sworn, on oath says he is fairly

worth the sum of fifty thousand dollars over and above all his just debts and liabilities.

ARTHUR B. MEEKER.

Subscribed and sworn to before me this first day of June, A. D. 1877. Witness my hand and official seal this day and year aforesaid.

[SEAL.] GEO. F. BIDWELL,
Notary Public.

Approved—

THOMAS DRUMMOND.

(Endorsed:) Filed June 2, 1877. W'm H. Bradley, cl'k.

228 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein William R. Fosdick et al. are the complainants and the Chicago, Danville and Vincennes Railroad Company et al. are the defendants, so far as the claim of the Hinckley Locomotive Works is concerned, as appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this ninth day of October, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the one hundred and second.

[SEAL.] W'M H. BRADLEY, *Clerk.*

229 UNITED STATES OF AMERICA:

In the Supreme Court of the United States, October term, A. D. 1877.

STEPHEN OSGOOD, FREDERIC W. HUIDEKOPER, THOMAS W. SHANNON, JOHN M. DENISON, GEORGE W. GIEL, ALANSON A. SUMNER, CHANDLER ROBBINS, and WILLIAM Y. HICKOK, appellants,

vs.

THE HINCKLEY LOCOMOTIVE WORKS, appellee.

And now come the appellants, by their solicitors, Crawford & McConnell, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. The court erred in entering the order of December fourteenth (14th), 1876, allowing and ordering the payment to the said The Hinckley Locomotive Works the sum of fifteen thousand seven hundred and ninety-three $\frac{75}{100}$ ($15,793.75) dollars from the funds in the hands of the receiver.

2. The court erred in overruling the objections of the intervening bondholders to the allowance of the sum of fifteen thousand seven
230 hundred and ninety-three $\frac{75}{100}$ ($15,793.75) dollars to the said The Hinckley Locomotive Works.

3. The court erred in entering the decree of April 28th, 1877, direct-

ing the payment of fifteen thousand seven hundred and ninety-three $\frac{75}{100}$ ($15,793.75) dollars out of the funds in court, obtained through sale of the railroad franchises and property.

4. The court erred in allowing and directing the payment of said sum to the said The Hinckley Locomotive Works out of the proceeds of the master's sale of the franchises and property of the Chicago, Danville and Vincennes Railroad Company, by virtue of the decree of the court.

5. The court erred in holding that the claim of the Hinckley Locomotive Works was superior and prior to that of the bondholders under the mortgage or deed of trust to William R. Fosdick and James D. Fish.

6. The court erred in appropriating any of the funds in the hands of the receiver to the payment of the said claim of the Hinckley Locomotive Works.

7. The court erred in appropriating any of the proceeds of the sale of the railroad property in court to the payment of the said claim.

CRAWFORD & McCONNELL,
Sol's for Appellants.

(Indorsement on cover:) No. 940. Frederick W. Huidekoper, Thomas W. Shannon, John M. Dennison, George W. Giel, Alanson A. Sumner, Chandler Robbins, and William T. Hickok, appellants, vs. The Hinckley Locomotive Works. N. Illinois C. C. U. S. Filed 22d October, 1877.

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worth the sum of fifty thousand dollars over and above all his just debts and liabilities.

ARTHUR B. MEEKER.

Subscribed and sworn to before me this first day of June, A. D. 1877. Witness my hand and official seal this day and year aforesaid.

[SEAL.] GEO. F. BIDWELL,
Notary Public.

Approved—

THOMAS DRUMMOND.

(Endorsed:) Filed June 2, 1877. W'm H. Bradley, cl'k.

228 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein William R. Fosdick et al. are the complainants and the Chicago, Danville and Vincennes Railroad Company et al. are the defendants, so far as the claim of the Hinckley Locomotive Works is concerned, as appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this ninth day of October, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the one hundred and second.

[SEAL.] W'M H. BRADLEY, *Clerk.*

229 UNITED STATES OF AMERICA:

In the Supreme Court of the United States, October term, A. D. 1877.

STEPHEN OSGOOD, FREDERIC W. HUIDEkoper, Thomas W. Shannon, John M. Denison, George W. Giel, Alanson A. Sumner, Chandler Robbins, and William Y. Hickok, appellants,

vs.

THE HINCKLEY LOCOMOTIVE WORKS, appellee.

And now come the appellants, by their solicitors, Crawford & McConnell, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. The court erred in entering the order of December fourteenth (14th), 1876, allowing and ordering the payment to the said The Hinckley Locomotive Works the sum of fifteen thousand seven hundred and ninety-three $\frac{75}{100}$ ($15,793.75) dollars from the funds in the hands of the receiver.

2. The court erred in overruling the objections of the intervening bondholders to the allowance of the sum of fifteen thousand seven

230 hundred and ninety-three $\frac{75}{100}$ ($15,793.75) dollars to the said The Hinckley Locomotive Works.

3. The court erred in entering the decree of April 28th, 1877, direct-

ing the payment of fifteen thousand seven hundred and ninety-three $\frac{75}{100}$ ($15,793.75) dollars out of the funds in court, obtained through sale of the railroad franchises and property.

4. The court erred in allowing and directing the payment of said sum to the said The Hinckley Locomotive Works out of the proceeds of the master's sale of the franchises and property of the Chicago, Danville and Vincennes Railroad Company, by virtue of the decree of the court.

5. The court erred in holding that the claim of the Hinckley Locomotive Works was superior and prior to that of the bondholders under the mortgage or deed of trust to William R. Fosdick and James D. Fish.

6. The court erred in appropriating any of the funds in the hands of the receiver to the payment of the said claim of the Hinckley Locomotive Works.

7. The court erred in appropriating any of the proceeds of the sale of the railroad property in court to the payment of the said claim.

CRAWFORD & McCONNELL,
Sol's for Appellants.

(Indorsement on cover:) No. 940. Frederick W. Huidekoper, Thomas W. Shannon, John M. Dennison, George W. Giel, Alanson A. Sumner, Chandler Robbins, and William T. Hickok, appellants, vs. The Hinckley Locomotive Works. N. Illinois C. C. U. S. Filed 22d October, 1877.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 940.

FREDERICK W. HUIDEKOPER, THOMAS W. SHANNON & AL.,
APPELLANTS,

vs.

THE HINCKLEY LOCOMOTIVE WORKS.

RETURN TO CERTIORARI.

FILED FEBRUARY 27, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 940.

FREDERICK W. HUIDEKOPER, THOMAS W. SHANNON & AL., APPELLANTS,

vs.

THE HINCKLEY LOCOMOTIVE WORKS.

RETURN TO CERTIORARI.

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1 United States circuit court, northern district of Illinois.

STEPHEN OSGOOD *v.* THE CHICAGO, DANVILLE AND VINCENNES Railroad Company, William R. Fosdick, James D. Fish, R. Biddle Roberts, William D. Judson, Amos Tenney, and James W. Elwell.	In chancery.

Transcript of record.

2 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Monday, the nineteenth day of July, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the one hundredth year.

WILLIAM H. BRADLEY, *Clerk.*

STEPHEN OSGOOD *v.* THE CHICAGO, DANVILLE AND VINCENNES Railroad Company, William R. Fosdick, James D. Fish, R. Biddle Roberts, William D. Judson, Amos Tenney, and James W. Elwell.	In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

3 Be it remembered that on the 24th day of March, A. D. 1875, came the said defendant, The Chicago, Danville and Vincennes Railroad Company, by Edwin Walker, its solicitor, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, a transcript of the record of the proceedings had in the circuit court of Will County, in the State of Illinois, in said entitled cause; the bill of complaint, as filed in said court on February 22, A. D. 1875, together with the exhibits annexed thereto, and the order of court entered of record on the same day in said entitled cause, as set out in said transcript, being in the words and figures following, to wit:

4 STATE OF ILLINOIS,
Will County, ss:

Will circuit court, February, 1875.

To the hon. judge of said court, in chancery sitting:

Humbly complaining sheweth unto the court your orator, Stephen Osgood, who sues in behalf of himself & all other holders of bonds or coupons of the Chicago, Danville & Vincennes Railroad Company, complains of said Chicago, Danville & Vincennes Railroad Company, & William R. Fosdick, James D. Fish, R. Biddle Roberts, William D. Judson, Amos Tenney, James W. Elwell, & says:

First. That a corporation was duly organized & created under the laws of the State of Illinois by virtue of an act approved February 16,

1865, with authority to construct & operate a railroad from Chicago to Danville, in said State of Illinois, & also to connect & consolidate said line of road with that of any other railroad in said State of Illinois or any adjoining State, with the further power to borrow money for corporate purposes & secure the payment of the said loan by mortgage upon the property, income, & franchises of the said corporation.

Second. As thereto duly authorized by law & its charter, the said Chicago, Danville & Vincennes Railroad Company did, on March
5 10, 1869, by the authority of the board of directors, & for its corporate uses, duly sign, seal with its common seal, execute, acknowledge, & deliver to defendants William R. Fosdick & James D. Fish, as trustees, its certain indenture of mortgage, a copy of which is herewith filed, marked "Exhibit A," & made part hereof, conveying all its road, made & to be made, together with all its appendages, equipment, & the income & franchises thereof, as security for an issue of bonds, amounting to $2,500,000, payable in forty years with seven per cent. interest, payable semi-annually on the first days of April & October of each year, both principal & interest payable in American gold coin, which said mortgage was duly recorded in each county in Illinois through or into which said road runs, & became by force of such record the first lien thereupon.

Third. In order to construct, equip, & operate its said line of railroad the said corporation proceeded to utter & put into circulation in the usual course of business & for value to bona fide holders, the entire amount of bonds designed to be protected by said indenture, & the said $2,500,000 in bonds are now outstanding & unpaid, & constitute, together with certain past due interest thereupon, as hereinafter stated, a just indebtedness of the said railraad company, defendant.

Fourth. And thereafter, to wit, on March 1st, 1872, & as duly authorized by law, the said Chicago, Danville & Vincennes Railroad
6 Company of Illinois, consolidated its stock and property with the Western Indiana Railroad Company, a railroad corporation organized under the general laws of the State of Indiana, & afterwards, to wit, on the 6th day of May, 1872, did also consolidate, according to law, with the Attica & Terre Haute Railroad Company, also organized under the general laws of the State of Indiana, copies of which articles of association are herewith filed, marked "Exhibits B & C," by virtue of which consolidations the said corporation, known thereafter as the Chicago, Danville & Vincennes Railroad Company, became vested with the lawful power under the laws of Indiana & proceeded to locate & construct a line of continuous railway, extending from the boundary-line between Indiana & Illinois at a point in Warren County, Indiana, southwardly through the counties of Warren, Fountain, Parke, & Clay to the town of Brazil, in said last-named county.

Fifth. In order to borrow money to construct, equip, and properly operate the said line of road in Indiana the said corporation proceeded, according to law & as directed by its board of directors, on March 12th, 1872, to sign, seal with its common seal, execute, acknowledge, & deliver unto William R. Fosdick & James D. Fish, as trustees, its certain mortgage or trust deed (a copy of which is herewith filed, marked "Exhibit D," and made part hereof) on the certain trusts & conditions & with the specific covenants therein expressed in order to secure
7 an issue of $1,500,000 corporate bonds, payable in forty years, with interest at the rate of seven per cent. per annum, payable on the first days of April & October of each year, both principal & interest due & payable in American gold coin, which said mortgage duly

conveyed unto the said trustees, but for the sole use & benefit of all the holders of such bonds, all the said so-called Indiana division of said railroad, constructed & to be constructed, together with all its equipments appertaining, income & franchises thereof.

Sixth. Under the protection & security of said instrument last recited the said Chicago, Danville & Vincennes Railroad Company for its corporate uses proceeded about the date last aforesaid to negotiate & put in general circulation for value, either absolutely or by way of hypothecation for loans by it effected, either whole or greate r portion of the bonds specified in said indenture, & the said sum of $1,500,000 of Indiana division bonds, together with certain unpaid interest thereupon as hereinafter specified, doth still remain outstanding & unpaid, as your orator charges, & constitutes a just debt & obligation of the said corporation defendant in the bonds of the different holders of such bonds, & they are severally entitled to the security & priority aforesaid.

Seventh. And thereafter, to wit, on April 24th, 1872, as thereby duly authorized by law & in accordance with the order of the board of directors, the said corporation defendant, by way of further assurance
8 & additional security for said two issues of bonds aforesaid, did sign, seal with its common seal, acknowledge, & deliver according to law unto, as trustees, its certain other trust-deed or mortgage (a copy of which is hereto annexed marked "Exhibit E" & made a part hereof), whereby the said corporation did convey all and singular its said Indiana division of railroad to said trustees by way of second mortage to secure said issue of $2,500,000 of bonds dated March 10th, 1869, & did further by the same indenture convey unto the said trustees the said Illinois division of said railroad by way of second mortgage to secure the said issue of $1,500,000 of bonds dated March 12th, 1872, which said mortgage was duly recorded within the time required by law in the proper offices for the record of such instruments in the several counties through which the said line of railroad was constructed or projected in the said States of Indiana & Illinois, & such instrument by delivery & record thereof became & has since continued to be a valid & continuing lien upon said property, subject, however, to the priorities of said previous indentures.

Eighth. And afterwards, to wit, on Dec. 16th, 1872, the said corporation by its officers did sign, seal with its common seal, execute, & deliver unto James D. Fish & James W. Elwell as trustees its certain other deed of mortgage, conveying its entire line of railroad both in Illinois & Indiana made & to be made, together with its appurtenances,
9 equipment, income, & franchises in trust & as security for a certain other contemplated issue of corporate bonds called convertible mortgage-bonds to the amount of $1,000,000, bearing seven per cent. interest per annum, payable on the first days of February & August of each year, both principal & interest payable in American gold coin (a copy of which said trust-conveyance is herewith filed marked "Exhibit F" & made part hereof). The said instrument was duly recorded in the proper offices in the different counties through which said road runs. And as your orator is advised & believes, & therefore so charges, the said corporation hath by its officers & agents negotiated either absolutely or by way of hypothecation all of said issue of so-called convertible mortgage-bonds, & the same are not nor is any portion thereof in the present custody of the corporate officers so as to be produced & canceled in court, but are in the hands of third parties who claim the same as an outstanding indebtedness of the said corporation, & said mortgage re-

mains of record as a lien against the property of this corporation & is wholly undischarged.

Ninth. And the said Chicago, Danville & Vincennes Railroad Company has proceeded to locate, construct, & put into operation only a portion of the line of railroad authorized by its charter & the laws of Indiana & Illinois, that is to say, from Danville, Illinois, northwardly through the counties of Vermillion, Iroquois, Kankakee, Will, &
10 Cook, to a place called Dalton about twenty miles from Chicago, & from a point on said road about ten miles north of Danville southeastwardly through Warren & Fountain Counties, & has also located & partially graded & bridged, an expense of about $150,000, a part of the line in Parke & Clay Counties.

Tenth. The said corporation defendant made no provision for, & did not leave on deposit at the place where it covenanted to pay its coupons or interest-warrants, any money whatever to pay the following instalment of interest on its bonded obligations, viz, on October 1st, 1873, & April 1st & October 1st, 1874, on its issues of $2,500,000 & $1,500,000, respectively, & also on February 1st & August 1st, 1874, & February 1st, 1875, on said issue of $1,000,000 convertible bonds; nor were the said interest-warrants, or any of them, paid at any of said periods, or since hitherto, but, as the plaintiff charges, said arrears of interest on the two eldest liens, amounting to $525,000 in gold (exclusive of interest thereon), still remaining outstanding in the hands of divers persons & corporations, who are many in number, & the plaintiff is not able to state their names, & the said corporation is wholly without means to pay the same, or any part thereof, & the same still remains wholly unpaid.

Eleventh. And afterwards, to wit, on January 12th, 1875, the said Chicago, Danville & Vincennes Railroad Company being then embarrassed & insolvent, did, by its president & secretary, sign, seal, execute, acknowledge, & deliver unto the defendant, R. Biddle
11 Roberts, a certain instrument in writing, called a chattel-mortgage, a copy of which is herewith filed & made a part hereof, & marked "Exhibit G," whereby the said railroad company, defendant, purported to convey, assign, & mortgage unto the said Roberts divers engines, cars, tools, & machinery, more specifically described & identified in said indenture, but embracing, as plaintiff believes & charges, either the whole or greater part of all the equipment which belongs to & is used on the said line of railroad, & all which are absolutely necessary to the due & efficient operation & conduct of the business of said railroad, & to produce tolls & income for said corporation, the said chattel-mortgage being declared by its terms to be executed, not for the security of any then existing creditors, but for the purpose of securing the payment of the principal & interest of a new issue of two-year bonds of the said corporation, amounting to one million of dollars. As the plaintiff is advised & believes, the said instrument has been filed for record in certain of the counties through which the said line of railroad runs in Illinois, while the said chattel-mortgage remains as a recorded cloud upon the priorities of the plaintiff, & thus the possession of all & singular the said property & chattels still remains with the said corporation defendant.

Twelfth. Your orator shows that the said corporation hath always heretofore, & still does, maintain its principal office business at Chicago, Cook County, Illinois, & nearly all its equipment is in use only
12 on its line in Illinois, & that as to the last issue of bonds, being the issue dated January 12th, 1875, *that* the same & the mort-

gage given to secure the said bonds are wholly illegal, fraudulent, & void, for that it is provided by the laws of the State of Illinois, in force at both the date' last & aforesaid, & obligatory on said corporation, that the said corporation shall not issue any bonds or execute any mortgage to secure the same without the consent of the holders of two-thirds in amount of the capital stock of said corporation, & that sixty days' notice should be given of a meeting held for such purpose, & that the consent & authority of the stockholders for the creation of such new indebtedness & mortgage should be recorded with such mortgage; whereas your orator shows that illegally & fraudulently the officers of said corporation did propose & execute such consent or direction of the stockholders, & that no authority from the stockholders for such bonds or mortgage was ever given or required by law, nor is any such consent recorded with the latter, & notwithstanding the illegal & fraudulent character of such bonds & mortgage, the present officers of said corporation intend, as your orator charges, unless prohibited from negotiating the same, to put into circulation as valid obligations some or all of the last issue of bonds dated January 15th, 1875, to the great fraud and irreparable injury of the complainant & all the bond & stock holders of said corporation.

Thirteenth. Your orator charges that the present mortgage in-
13 debtedness of said corporation defendant, exclusive of past due & unpaid interest, stands about as follows, including said last two mortgages as executed by the officers thereof:

First mortgage	$2,500,000
Ind. division mortgage	$1,500,000
Convertible bonds	$1,000,000
Chattel-mortgage bonds	$1,000,000
	$6,000,000
To which past due interest should be added, amounting to..	525,000
Making a total of	$6,525,000

in gold. That notwithstanding such enormous liability the said line is only completed & in operation 138 miles, making therefore a recorded bonded liability upon each mileage of upwards of $44,000 for each & every mile; whereas the fair cost or cash value thereof, including all equipment used therein, could not equal one-half such issue. And besides the said mortgage liability the said corporation under oath of its officers hath returned to the auditors of public accounts of the State of Illinois that it owes an indebtedness other than that secured by said mortgages of $826,682.

And your orator charges that over & above said acknowledged floating liability in truth & in fact the books of said corporation defendant show an indebtedness due to the firm of J. E. Young & Company (which said firm is composed of Joseph E. Young, the general manager of said corporation from its organization up to Jan., 1875, & William D.
14 Judson, the president, & Amos Tenney, the treasurer thereof), on certain construction contracts purporting to be made between said firm & the corporation of which they were officers, to the further amount of about $700,000. And that there is also outstanding a legal liability of said corporation consisting of divers pieces of commercial paper executed by the proper officers of said corporation & in the hands of persons claiming to be innocent holders thereof for value to the further amount of about $500,000, which liability is disputed by said corpora-

tion because it is alleged such paper was given by way of accommodation only. But your orator charges that certain courts of the State of Illinois, where actions have been brought to enforce such paper against the said defendant corporation, have decided its defence to be bad & have rendered judgments against it, & that even now many suits are pending against said corporation to collect large amounts of such disputed paper. And also the said corporation hath accepted conveyance of the title to a large amount of real estate in the city of Chicago by conveyance from one Samuel J. Walker & one Joseph E. Young, much of it not required for the company's use, & hath executed its written guaranty by the hands of its president obligating itself to pay at divers periods other very large amounts of money, amounting in the aggregate to upwards of $500,000.

Your orator charges, therefore, that the acknowledged & unacknowledged floating indebtedness of said corporation defendant actually exist about as follows:

Reported by corporation	$826,682
So-called accom'odation paper	$500,000
Due J. E. Young & Co.	$700,000
Liability on guaranties	$500,000
Making a total of	$2,526,682

Or being a bonded & general liability of over $9,000,000, at & after the rate of about $68,000 for each & every mile of said road, when said road & all its property is only returned by its officers to the auditors of public accounts of Illinois as worth in cash in Illinois $361,117.90.

Fourteenth. Your orator shows that by the original prospectus, offering the first-mortgage bonds for sale, it was declared by the directory of said corporation the line of road contemplated in Illinois was 140 miles in length, & that the first mortgage debt upon it would be only $18,000 per mile; whereas in fact the said corporation only built its railroad from Danville to Dalton, 108 miles, & proceeded to issue the entire mortgage loan, & all or very nearly all the amount of the $1,500,000 loan for the construction of the Indiana division has been issued by the corporate officers, Young, Judson, & Tenney, although only about twenty miles of the whole line has been actually constructed.

Fifteenth. Your orator shows that the annual interest-burden of said corporation on the two eldest liens, which aggregate $4,000,000, amounts to $280,600 in gold, & that for & during the twelve months ending June 30th, 1874, the said corporation did not pay any interest as such, or apply any of its income or tolls or interest indebtedness, & during such period its entire gross receipts were reported by it as only $724,334.13, & its ordinary current expenses 444,335, leaving an apparent currency bal. of $276,999.13; but that besides the payment of such ordinary expenses, the said corporation officially returned, under the oath of its officers, to the said auditor of public accounts, that it had paid out during said time the following additional sums of money, that is to say:

On construction	$1,100,870 45
Additional equipment	$314,250 68
" real estate	76,110 97
Taxes	1,142 37
Total	$1,552,386 47

Making a sworn total deficit on the operation of that year alone of $1,275,387.34, without any payments having been made on the bonded debt, for which the tolls & revenues are primarily charged under the several trust-conveyances aforesaid.

Sixteenth. Complainant charges that such sworn report, stating the said corporation had expended or paid during the twelve months immediately prior to June 30, 1874, the said sum of $314,250.68, or anything near that sum, for additional equipment for said railroad, is a false & fraudulent report, & in that regard shows the two following
17 sworn reports of the year 1872 & the year 1874, made to the board of railway commissioners of Illinois, of the equipment of said road, by the oath of its proper officers:

	Owned in 1874.	Owned in 1872.
Locomotives	20	24
Pass. cars	6	10
" " 2 class	2	3
Baggage	3	3
Box-cars	226	230
Coal-cars	560	545
Hand	15	....

Showing an actual ownership of all character of equipment & classes & rolling-stock in 1872 in excess of those owned in 1874, except in the one item of coal-cars. And your orator also shows that at the same time such report was made of the payment of $314,250.68 for additional equipment during the year, that said corporation reported in the sworn statement to said auditor that the fair cash value of its entire equipment at that time was only $150,400.

Seventeenth. Complainant shows that the present capital stock of said corporation is stated & returned to be $2,500,000, & that in an official report made by the order of the board of directors of defendant in February, 1870, it was stated, in order to invite the confidence of capitalists & secure the satisfactory placing of the so called first-mortgage bonds, that "subscriptions have been made to the capital stock of the company for upwards of two millions & one hundred thou-
18 sand dollars, which pay for the right of way, grading, bridging, culverts, & other work of a similar character for the entire road and for a portion of thereon" the complainant charges; whereas on information & belief that the present outstanding shares of capital stock of said defendant corporation was originally issued not upon any costs or bona fide stock subscription, nor was any money paid thereupon, but the same were issued under so-called construction contracts made between said corporation & the said firm of J. E. Young & Co., composed as aforesaid, whose members were in fact the sole managers & controlling spirits of said corporation, & for such reason complainant charges that said stock was fraudulently issued by the officers of said corporation without any legal, fair, or valuable consideration to themselves, on contract made between themselves as individuals & as directors, & that consequently such stock is not in justice & equity entitled to any control or voice in the management of said road as against its bona-fide creditors.

Eighteenth. Complainant shows that the present directors of said corporation are J. W. Elwell, J. D. Fish, William D. Judson, Amos Tenney, & Matthew Taylor, who all reside in New York City, New York; J. L. Donovan, who resides at Watseka, Illinois; A. Gilbert, at Rose-

ville, Ill.; E. Ellery, at Chicago, Ill.; & George Nebecker, at Covington, Indiana; that all of said directors were & are elected by the voting-power of said stock so issued as aforesaid & practically controlled
19 by said Judson, Tenney & Young, & that in truth none of said directors have any considerable ownership in said stock except said Judson & Tenney, & that the said director Fish is the same person designated as trustee in the trust conveyances aforesaid. The secretary of said corporation is George E. Borland, who is also a resident of New York. The main office of said corporation is kept & maintained in New York City, where its record is kept & its president & secretary reside.

Nineteenth. Complainant shows that in truth the said corporation hath not for over three years last past kept its office, or elected its directors, or kept the corporate books upon inspection, which are required by the constitution laws of the State of Illinois of such corporation, but hath wholly failed, neglected, & refused to comply with all & singular the requirements of the law in that respect, & thereby said managing officers have subjected the corporation to sequestration & forfeiture under the laws of Illinois.

Twentieth. Complainant is the holder of eleven of the bonds issued by the said corporation defendant, that is to say, nine (9) bonds of $1,000 each of the issues of March 10, 1869, numbered 180, 982, 983, 984, 985, 986, 987, 1791, & 1792, and two (2) bonds of $1,000 each of the issue March 12, 1872, numbered 3526 & 3527, together with divers interest-warranty thereto attached, falling due Oct. 1, 1873, April 1, 1874, & Oct. 1, 1874. That said corporation did not at any of said dates pro-
20 vide any money at its agency in New York to pay the said interest-warrants or any of like character, nor did it pay the same, although demanded; but the said corporation passed resolutions & published and widely circulated a public notification to its bond-creditors that it could not & would not pay the four coupons from October 1, '73, to Oct. 1, 1875, when they matured; & so the same remains wholly unpaid on all such issues of bonds.

Twenty-first. Complainant shows also that the condition of said first mortgage dated March 10, 1869, hath been still further broken, because the said railroad corporation did not on April 1, 1874, make any provision for a deposit of any money in the sinking fund, as in & by said mortgage it covenanted to do; but hath from said date since hitherto continuously failed, neglected, & refused, & still doth fail, neglect, & refuse to make any provision for such sinking-fund provision, to the great detriment of the security pledged to the complainant *all* bond-creditors.

Twenty-second. Complainant shows that while the bond & mortgage under which he claims recite that all the equipment, rolling-stock, engines & cars, wherever purchased, are included in & bound by the liens of such mortgages; that in consequence of the recent constitution & laws of the State of Illinois, in which State the main business office of said corporation is situate & the said rolling stock is mainly used, it has become a matter of great doubt whether the present equipment
21 of said road, purchased since the date of said mortgages, is bound thereby, unless the bond creditors arrest the default which has occurred upon said mortgage & procure immediate possession of all such chattels by the appointment of a receiver for breach of the condition thereof, & before the right of judgment or attachment creditors have accrued by way of liens thereupon, & before any of said so-called chattel-mortgage bonds shall have been negotiated by the said railroad company.

Twenty-third. Plaintiff alleges also that the defendant, Milton O. Graham, recovered judgment against the Attica & Terre Haute Railroad Company in the Fountain circuit court, on Sept. 9, 1871, for $175.00 & costs, & Washington Graham recovered judgment against said corporation in said court, March 2, 1872, for $800, which judgments remain wholly unpaid & execution hath not been stayed on either of such judgments by appeal or supersedeas, by reason of which default the said Chicago, Danville & Vincennes Railroad Company, the successor by consolidation of the property & franchises of said Attica & Terre Haute Railroad Company, hath become forfeited under the statute, & the said corporate affairs are required by law to be wound up.

Twenty-fourth. Plaintiff shows that the said Chicago, Danville & Vincennes Railroad Company is seized & in the possession & use
22 of a line of railroad in Indiana & Illinois, together with the right of way, depot grounds, machine-shops, bridges, iron rails, ties, & the engines, cars, tools, furniture, supplies, and machinery, necessary and usual to operate such a line of railroad, together with the franchises to operate the same, & hath not, as the plaintiff is advised, any other property of any considerable real or market value; & the complainant distinctly avers that the said property is an utterly inadequate security for the mortgage-debt charged against it; that the incomes and tolls of said railroad are not sufficient to keep down or satisfy the regular accruing interest instalments of said mortgage-debt, and that the said Chicago, Danville & Vincennes Railroad Company is utterly insolvent.

Twenty-fifth. And as reasons for the immediate appointment of a receiver of said corporation & said mortgaged property, complainant charges that said corporation is not worth one-half the mortgage-debt; that its income & the tolls of the corporation are being diverted from the use of the bond creditors, & applied to the payment of unsecured indebtedness, contrary to the trust of the mortgage; that judgments have been suffered to remain unpaid, so as to forfeit the franchise of said corporation; that the capital stock of said corporation has been issued by its present officers on contracts made with themselves, illegally & without fair or valid consideration, & is worthless; that they have committed divers breaches of trust, & misappropriated the funds of the corporation pledged to the bondholders, & paid out divers
23 sums of money to & for the use of the Chicago, Danville & Vincennes Railway Company (a corporation organized by the officers of the defendant company), & of which company the said Judson was also president; and also by payments to & for the benefit of the Chicago & Southern Railroad Company; and also by payments on the purchase of divers parcels of real estate & dock property in the city of Chicago, not for the use of or used by the said corporation, all which payments were illegal, beyond the corporate capacity to make, & a fraud on the bona-fide creditors. That said corporate officers have executed fraudulent & illegal bonds & a mortgage to secure the same, seeking to negotiate the same, & thereby defeat the just priorities of the bond-creditors; that judgments have been recovered, & many suits are pending against the said corporation; & if executions or attachments are levied on the personal property of said corporation, that the just liens of the bond-creditors will be defeated; that under the management of the present corporate officers the corporate-debt is & has been constantly & greatly increasing; that false reports have been made of the condition, receipts, & expenditures of the road; that the wages of most of the operatives on the road have been suffered to fall in arrear, & have not been paid

for about five months; that said chief corporate managers are non-residents, irresponsible, & have been & are unfaithful trustees;
24 & that, notwithstanding the enormous amount of debt they have created against the property, that the corporate assets are now & never have been worth the one-third such liabilities; that the income of the property is being taken beyond the jurisdiction of this court, & into other States.

Wherefore, in consideration of the premises, your orator prays that an account may be taken of the several sums now due & owing to the plaintiff & all other bond creditors of said corporation, & that the persons & corporations respectively entitled may have judgment for such sums as they may respectively prove they are entitled to recover against said company; that the court may establish the different liens & priorities to which the several mortgage or judgment creditors are entitled upon the real & personal estate & income of the said corporation; that after the respective liens & priorities of the different creditors are established, that the court will decree a foreclosure of said mortgage on the said real & personal property & franchises, & order a sale thereof for the satisfaction of such sums as may be found due from the corporation, & that on such sale all equity of redemption of the said Chicago, Danville, & Vincennes Railroad Company, & all claiming by, through, or under it shall be forever barred & foreclosed.

And the plaintiff further prays that a receiver be forthwith appointed by the court to be vested with the possession of all & singular the said corporate assets of every description, & to operate the said line
25 of railroad, & administer the said trust estate under the order of the court, & according to equity practice, & that the officers & agents of said corporation, & all trustees under any of said mortgages, shall be directed & required forthwith to deliver up possession of all such corporate property, & shall be enjoined from, in any manner, interfering with the custody or management of said corporate property.

And, that the said corporation & all its officers & agents be temporarily enjoined from in any manner issuing, negotiating, or hypothecating any of said so-called chattel-mortgage bonds, or any other bonds of said corporation now in this custody, & shall be required to deliver all such bonds & obligations into the custody of the receiver until such time as a final decree can be envoked cancelling said chattel mortgage & bonds as illegal & void. And your orator prays that the defendant to this bill be duly summoned to answer the premises, but not under oath, all answer under oath being hereby expressly waived.

And your orator, in behalf of himself & all other bond creditors, prays for all such other & further relief as may be necessary to protect their claims & priorities in the said trust estate, & as the court may be competent to award in the premises.

(Signed) STEPHEN OSGOOD,
Complainant.

26 H. CRAWFORD,
S. D. A. PARKS,
Sol'rs for Compl't.

STATE OF ILLINOIS,
Will County, ss:

Cornelius R. Field, upon his oath, says that he is the duly authorized agent of the complainant in the above-entitled action; that he has read the foregoing bill of complaint & knows the contents thereof, & that

the facts stated therein are true, of his own knowledge, except as to those matters stated on information & belief, & as to those matters he verily believes them to be true.

(Signed) CORNELIUS R. FIELD.

Sworn & subscribed to before me this 20th day of Feb'y, 1875.

(Signed) [SEAL.] HENRY P. CALDWELL,
Notary Public.

STATE OF ILLINOIS,
Will County, ss:

I, Conrad Tatge, clerk of the circuit court in & for said county, in the State aforesaid, & keeper of the records & files of said court, do hereby certify that the above & foregoing is a full, true, & complete copy of a certain bill of complaint filed in said court on the 22d day of February, A. D. 1875, in a certain cause now pending in said court, wherein
27 Stephen Osgood is complainant & the Chicago, Danville & Vincennes Railroad Company, William R. Fosdick, James D. Fish, R. Biddle Roberts, William D. Judson, Amoz Tenney, & James W. Elwell are defendants. In attestation whereof, I have hereunto set my hand & affixed the seal of said court, at office in Joliet, in said county, this 23d day of February, A. D. 1875.

[SEAL.] CONRAD TATGE, *Clerk.*

(Endorsed:) Filed Feb'y 22d, 1875. (Signed) Conrad Tatge, clerk.

28 CHICAGO, DANVILLE & VINCENNES R. R. CO. MORTGAGES.

EXHIBITS.

1.—A.

First: $2,500,000 gold, 7 per cent., March 10, 1869; due April 1, 1909. Illinois division.

2.—D.

First: $1,500,000 gold, 7 per cent., March 12, 1872; due April 1, 1912. Indiana division.

3.—E.

Supplemental mortgage, to secure above. $4,000,000 gold bonds April 24, 1872. Illinois and Indiana divisions.

4.—F.

Second: Convertible bonds, gold, 7 per cent., $1,000,000, Jan. 1, 1873: due Feb. 1, 1893. Illinois and Indiana divisions.

5.—G.

Chattel mortgage, to secure $1,000,000 currency bonds, Jan. 12, 1875; due Jan. 12, 1877. On equipment of Illinois and Indiana divisions.

29 *The Chicago, Danville & Vincennes Railroad Company, to William R. Fosdick and James D. Fish, trustees.—Trust deed.*

30 This indenture, made this tenth day of March, in the year one thousand eight hundred and sixty-nine, between the Chicago, Danville and Vincennes Railroad Company, a corporation of the State of Illinois, party of the first part, and William R. Fosdick and James D. Fish, of the city and State of New York, trustees upon certain trusts hereinafter specified and provided, party of the second part.

Whereas the Chicago, Danville and Vincennes Railroad Company, a corporation of the State of Illinois, under and in pursuance of the provisions of the act incorporating the same, has commenced to construct and put in operation a railroad from Chicago, Cook County, Illinois, southerly through the counties of Will, Kankakee, Iroquois, and Vermilion, to the city of Danville, and then southeasterly to a point on the State line of Indiana, joining and connecting at said point with the Evansville, Terre Haute and Chicago Railroad, and is now engaged in constructing the same; and for the purpose aforesaid, needs and has resolved to purchase and transport iron rails, chairs, spikes, and other iron and materials necessary therefor, and engines, cars, and other rolling-stock and machinery to be used thereon, and to borrow a portion of the money necessary to make such purchase, and to pay for such transportation and the construction, completion, and equipment of said road.

And whereas, at a meeting of the board of directors of the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, held pursuant to law on the second day of February, in the
31 year 1869, the said board of directors resolved and enacted an order and resolution as follows, to wit:

Resolved, That to aid in providing the means required for the construction and equipment of this company's road, an issue of bonds shall be made by the company amounting to two millions and five hundred thousand dollars, each bond to be for the sum of $1,000, and to bear seven per cent. per annum interest, payable semi-annually on the first days of April and October in each year, and the principal to be payable on the first day of April, 1909, and both the principal and interest to be payable in United States gold coin at par, in the city of New York: and each bond to contain an express waiver of all recourse by the holder of the same to any individual liability of the stockholders of this company; that said bonds shall be dated as made on the tenth day of March, A. D. 1869.

In case default be made in the payment of any half year's interest on any of said bonds, and the warrant for said interest shall have been presented and its payment demanded, and such default shall have continued for six months after such demand without the consent of the holder of said coupon or bond, then and therefore the principal of all such bonds shall become due and payable. That a warrant for such semi-annual payment of interest shall be made and authenticated for and on behalf of this company by the secretary of this company, and annexed to each bond.

That said bonds shall be prepared by the president of the company, and signed by him for and on behalf of this company, and attested by the secretary, and shall have annexed to them a certificate of authentication of the trustee or trustees under the mortgage made to secure them, and shall not be issued or obligatory without such certificate. That from and after the first day of April, A. D. 1873, and until the

maturity of such bonds, there shall be annually created, paid,
32 and deposited with a sinking-fund commissioner or commissioners,
to be appointed by the board of directors, and to hold office at the pleasure of the board, a sinking fund, to aid in the final redemption of said bonds, of an amount of money derived from the net earnings of said road, and property equal to one-half of one per cent. on the whole amount of said issue of bonds at the time of any such payment outstanding.

Said fund and all investments and accounts thereof and its management shall always be under the control of this board, and shall be from time to time continually invested by the commissioner or commissioners in the purchase of said bonds, or bonds of the Government of the United States, or of the State of Illinois; and the interest on all such investments collected shall be added to, and continually compounded with, said fund, and the same shall be used and appropriated safely to redeem and eventually to pay off said issue of bonds hereby provided to be made. "No bond of said issue purchased by said fund shall thereby be collected, but shall, with its coupons, be stamped as owned by said sinking fund, and it or its amount, if destroyed, shall remain a liability against the company, and the interest shall be paid to the said sinking fund the same as paid on other bonds, and shall be added to said fund until the whole of said issue of bonds shall have been absorbed or otherwise paid off, when the whole issue shall be cancelled.

"Any bonds of said issue which may be in said sinking fund at any time may be destroyed by order of the board of directors of said company; but in such case the semi-annually accruing interest on the amount so destroyed must thereafter be paid to said sinking fund. The bonds and securities belonging to the sinking fund shall be kept in the office of the sinking-fund commissioner or commissioners, which shall be at or near the principal office of said railroad company. That for the purpose of securing the final payment of said issue of $2,500,000 of bonds,
with all interest to accrue thereon, this company will make and
33 deliver to William R. Fosdick and James D. Fish, as trustees, a mortgage and deed of trust, conveying to said persons as trustees, for the benefit of every holder of such bonds, or any of them, all the road of this company extending from Chicago, Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermilion to the city of Danville, and thence southerly to a point on the State line of Indiana, where it will join and connect with the Evansville, Terre Haute and Chicago Railroad, with all the property, rights, and franchises of this company of every kind and description whatever, pertinent to said road between said terminal points, and all the income to be had and derived from operating the same, in trust, to secure the final payment of said bonds as aforesaid, with all the rights, covenants, powers, and authority, in case default be made by this company in such payments as in said deed of trust shall be specified, to foreclose said mortgage, and to sell the property so mortgaged, or to take possession of and operate the same, and receive the incomes thereof; but not in any case before any default to disturb or interfere with the company in the possession, control, and management thereof, or from selling or exchanging any of the personal property or machinery or equipments thereof, or any of the lands or real estate not necessary for the use and operation of the railroad as to all of which, as will be in said mortgage and deed of trust specifically stated, agreed upon and set forth. That the president of this company is hereby authorized and fully empowered to make and sign, and execute, and seal with the corporate seal of this company, the said mortgage and deed of trust, and to acknowledge the same for

and on behalf of this company for record; and on the acceptance of said trust and signing the said deed by the said trustees to cause the same to be recorded according to law, and thereupon to make, sign, and execute and prepare said $2,500,000 of bonds for issue and sale, as shall be hereafter ordered by this board."

34 And whereas the said Chicago, Danville and Vincennes Railroad Company, party of the first part, hath, in accordance with the provisions of said order and resolution, made and executed bonds to the amount of two million and five hundred thousand dollars, of the form, denomination, and character prescribed by said order and resolution, and hold the same to be authenticated, issued, used, and disposed of for the purposes in said order and resolution stated;

Now, therefore, in further pursuance of said order and resolution, and to the end and purpose of securing and assuring the punctual payment of said two millions five hundred thousand dollars of bonds, and every part thereof, which may be issued to the persons who may become the holders of the same, or any of them:

This indenture witnesseth that the said Chicago, Danville, and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and the further consideration of one dollar to them in hand paid by the said party of the second part, trustees, as aforesaid, at any time before the ensealing hereof, the payment of which is hereby acknowledged, doth hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the said William R. Fosdick and James D. Fish, trustees, as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire railroad of the party of the first part, lying, being and extending from its terminus in the city of Chicago, Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermilion, to the city of Danville, and thence southeasterly to a point on the State line of Indiana, joining and connecting at said point with the Evansville, Terre Haute and Chicago Railroad, being in length about one hundred and forty miles, with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels connected with or used in the using or operating of

35 said railroad or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever pertinent thereto. Provided, however, that this grant and conveyance aforesaid shall not include nor operate to transfer any lands, goods, chattels, property, machinery, equipments, or other matters that need not be used for any purpose incident to the management or operation of said railway or the repair thereof, or in the business of said railway company; nor any franchises, power, or corporate rights to build that portion of the line of railroad which, by its charter, it is authorized to locate and construct, and not embraced within the terminal points hereinbefore described; but all which last-mentioned franchises and right of way shall be wholly excepted and exempt from these presents, and the grant and conveyance herein specified: nor shall these presents in any way prohibit the party of the first part from selling and conveying or otherwise disposing of the same and all the proceeds thereof; nor from receiving, using, and applying any money on personal property of said company to the repairs of said road or its appurtenances, or to its

current expenses, or to the purchase of necessary machinery or the removal thereof; and the board of directors of said company may likewise distribute and pay any net annual incomes and profits to stockholders, after paying the interest on said bonds, and providing for any sinking fund required to be created and kept. To have and to hold the said railway property, premises, interests, rights, and appurtenances mentioned, as aforesaid, and hereby conveyed, or intended so to be by this conveyance, unto the said party of the second part as such trustees as aforesaid, and to their successors in said trust or assigns, to and
36 for the only use, benefits, and behoof of the said trustees, and their cestui que trusts, their successors and assigns, forever; but in special trust and confidence, and upon the conditions following, that is to say:

First. That this conveyance is for and shall be by the said party of the second part, their successors and assigns, held, used, and owned solely for the benefit and protection and security of the persons and corporations who shall hold and own the bonds about to be issued as aforesaid by the party of the first part, and for enforcing the stipulations of said company as to said issue of bonds and the disposal thereof, and securing the same and the final payment thereof in their true intent and meaning, whether contained in said bonds or the interest-warrants attached to them or this deed.

Second. That for the better securing and confirming the title and powers of the said party of the second part, their successors and assigns, in the said premises and property hereby conveyed, and in and to any premises or property or rights hereafter accruing or to be acquired by said party of the first part appurtenant to said railroad, which is intended to pass or to be passed by this conveyance, that said party of the first part, their successors and assigns, will and shall, as often as may be lawfully required by the party of the second part, or their successors or assigns holding the above-granted trust, do such acts and make such other and further conveyances and assurances in law as such party of the second part shall by counsel learned in the law be advised are necessary for the better carrying out the object of the parties of this mortgage or deed of trust.

Third. That if the said party of the first part, their successors or assigns, shall well and truly pay to the holders of said two millions and five hundred thousand dollars of bonds so to be issued and hereby secured the respective sums of money and interest due and accruing on said bonds on the day and times therein mentioned, and according to
37 the term and effect of said bonds, then and thenceforth this indenture and all the estate hereby granted shall become and be utterly void and of no further effect, and the same shall be, by such payment, wholly annulled and satisfied without any further receipt or entry of satisfaction of record whatever, but shall be, if required, entered and certified on any record of the same as so satisfied by said party of the second part or their successors.

Fourth. That until default shall have been made by the party of the first part in the payment of principal or interest of the said bonds or some of them, or until default shall have been made in respect to something herein required to be done by the said party of the first part, the said party of the first part shall be suffered and permitted to possess, use, occupy, manage, and operate the said railroad property and franchises and appurtenances, and to renew, replace, and repair the same and every part thereof, and take and receive and use the tolls, rents,

issues, incomes, and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

Fifth. In case default shall be made in the payment of any interest on any of the aforesaid bonds issued or to be issued according to the tenor of the coupons annexed or of the provisions thereof, or in case default shall be made in the payment of the principal of said bonds or any of them when the same shall become due, without the consent of the holder of such bonds on which such default shall occur, the said party of the first part hereby covenants and agrees to and with the said party of the second part and their successors and assigns that, within six months after such default shall have occurred, the said default still continuing, the said party of the first part, on demand of said trustee or trustees for the time being, shall and will surrender to him or them, or to their agent, the actual possession of the herein granted and demised railroad and premises, together with all the books, records, papers,
38 accounts, and money of said company, and all management and control thereof; and that all the expenses of taking, holding, managing, and operating said property, if possession be so taken, shall be paid from the incomes and profits thereof; and if said property shall, after such taking possession thereof, be sold, then from the sale thereof; or such expenses may be paid from the sale of any personal property, as the said trustees may deem proper; and that said party of the second part and their successors, having taken such possession, may manage, operate, and control said road and property, and all of its affairs, and appoint all needful agents and employees for that purpose, and pay the same, and receive all the incomes, issues, and profits thereof, and apply the same to the payment of the said interest so in default, according to the true intent and tenor of the said bonds, and the coupons annexed, and the terms of this deed, until such default shall have been satisfied, if such incomes and profits shall satisfy the same, first paying all expenses of such possession and management, and all taxes and assessments and charges on said property, and a just compensation for their own services as trustees. But in any and all cases of such taking of possession by said party of the second part, and paying up any such default and the expenses aforesaid, the said party of the second part shall immediately thereafter redeliver the said railway and premises, books, records, and money and accounts, in the possession of the party of the first part. Provided, that no such demand for such possession shall be made by the said trustee or trustees until they shall have been required by the holders of at least the one-half of all of the said issue of bonds which shall then be unpaid and outstanding to make such demand and to take such possession of said road and property.

Sixth. That in case default shall be made as aforesaid, and shall continue as aforesaid, it shall be lawful for the party of the second
39 part, or their successors in said trust, after entry as aforesaid, or other entry, or without entry, personally or by agent or attorney, to sell and dispose of, to the highest bidder, all and singular the premises hereby conveyed, or intended to be, as an entirety, at public auction, in the city of Chicago, State of Illinois, at such time as said party of the second part may appoint, first having demanded of the party of the first part full payment of all money then in default; and also first having given sixty days' notice of such time and place of sale, and a full description of the property to be so sold, by advertisement thereof in two newspapers, one published in Chicago, in the State of Illinois, and one published in the city of New York; and to adjourn said sale from time to time in their discretion; and, if adjourned, to make such sale in man-

ner aforesaid without further notice, at the time and place to which it may be so adjourned; and upon such sale, and receiving the purchase-money therefor, to convey the same by good and sufficient conveyances to the purchaser or purchasers, and such sale and conveyances so made shall convey all the right, title, estate, interest, and property of the said party of the first part, of, in, and to the said road, premises, franchises, and property, to the said purchaser, in fee simple, forever, and shall be a perpetual bar, both in law and equity, against the said party of the first part, and their successors and assigns, and against all and every person claiming or to claim the said premises, or any part thereof, under them forever. After deducting from the proceeds of such sale the expenses of sale and conveyance, and all advances or liabilities which may have been made or incurred by the party of the second part in operating and controlling and maintaining the said railroad and property, and in managing its business and affairs, while in possession, and all payments for taxes, charges, and assessments on said premises, or any part thereof, as well as reasonable compensation for their own services, to apply the proceeds of such sale to the payment of the interest of said two millions
46 and five hundred thousand dollars of bonds, or so many of them as shall have been issued by said party of the first part, and be then outstanding, pro rata, until all such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds, pro rata, until such principal shall be paid; and if any surplus remains after paying all of said matters, to pay such surplus to the party of the first part; and such payments shall be so made on said bonds, whether the same shall have become due or not at the time of such sale: Provided, that said trustee or trustees may, in their discretion, sell the said premises as one entirety, and in doing so shall make legal distribution of the proceeds of such sale accordingly. It is hereby declared that the receipt of said trustee or trustees making any such sale, to the purchaser of the premises, for the purchase-money, shall be a full and sufficient discharge of such purchaser therefor, and that said purchaser shall not, after payment of said purchase-money and obtaining such receipt therefor, be liable or in any way be bound to see said purchase-money applied to this trust, or otherwise or in any manner answerable for its loss or application, or obliged to inquire into the authority for making any such sale.

Seventh. At any sale of the property aforesaid, or any part thereof, made by virtue of these presents, or by judicial authority, the said trustee or trustees may bid for and purchase, or cause to be purchased, the property so sold, or any part of it, in behalf of the holders of said bonds secured by this deed then outstanding, at a reasonable price, if only a part of it be sold; but if the whole property be sold, at a price not exceeding the whole amount of said bonds and interest then outstanding.

Eighth. If default be made by the party of the first part in the payment of any half-year's interest on any of said bonds, and the warrant or coupon for such interest shall have been presented, and its payment demanded, and such default shall have continued six months after
41 such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all of said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and upon the written request of the holders of a majority of the said bonds then outstanding shall proceed to collect both

principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as herein provided.

Ninth. It is hereby mutually agreed by the parties hereto that the trustees shall be responsible only for gross negligence and willful default, and that they shall not be bound to do any act touching the execution of the trust, except at their own option, which may involve them in personal expense or liability, unless first duly and satisfactorily indemnified against by one or more of said bondholders. In case of the death, resignation, or inability to act of any trustee, the board of directors may appoint a successor, and failing to so appoint, any court of competent jurisdiction may appoint a trustee to fill each vacancy, on the application of the holders of the one-sixth part of the bonds hereby intended to be secured then outstanding, and such appointment by the board or by court shall invest the trustee so appointed with all the interest, estate, powers, and authority in the premises, and subject him or them to the same obligations hereby given and granted to the party of the second part herein; and the said party of the first part hereby further covenants and agrees with the party of the second part and their successors, and with the holders of each and all of the said issue of two millions and five hundred thousand dollars of bonds which may be issued, that the said party of the first part will create and make a sinking fund for the redemption of such bonds, and each of them, by setting aside and depositing with a sinking-fund
42 commissioner or commissioners, to be appointed by the party of the first part for that purpose, from and after the first day of April, in the year 1873, and annually thereafter until the maturity of said bonds, from the net earnings of the said road and property, after the payment of all interest on said bonds, an amount of money equal to one-half of one per cent. of the principal amount of all such bonds hereby secured which shall then be outstanding.

Such sinking-fund moneys shall, from time to time, under the orders of the party of the first part, be invested in the purchase of the bonds so issued, or in bonds of the Government of the United States or State of Illinois; and the money accruing on any and all of such investments for interest, as fast as the same shall be received, shall be added and paid into said sinking fund, and compounded therein continually, and reinvested in like manner with the other money of said fund; and the same shall be used solely to redeem and eventually pay off said bonds herein and hereby secured. That the board of directors of said railway company, party of the first part, shall have entire control over the management of said sinking fund, and every person in charge of or connected wit same, and shall from time to time direct in what bonds or securities it shall be invested, and at what prices or rates, and how it shall be kept, and the manner of keeping the accounts thereof; and shall require ample security to be given to them by any person in charge of its moneys or its securities or bonds for its safe-keeping. Every bond of the said issue which may be purchased and held by said sinking-fund shall remain in full force until the whole of such issue shall have been so absorbed or otherwise redeemed by said party of the first part, or until cancelled as hereinafter provided, and the interest on such bonds held by said sinking fund shall be paid by said railroad company regularly as the interest on its other similar bonds is paid, and
43 such bonds so in the sinking fund shall, as to the annual amount of money to be paid from net earnings into said fund, be regarded as outstanding.

At the annual meeting of the stockholders in the year 1874, and a

each annual meeting thereafter, all bonds of said issue, and the coupons thereon, then being in the sinking fund, purchased by said fund as aforesaid, shall be withdrawn from said fund, and cancelled and so certified by the commissioner and treasurer of the company, and the signatures thereto mutilated; and in place thereof the treasurer of the company shall give to the commissioner a receipt therefor, specifying the same and such cancellation, which receipt shall be filed in the office of such fund, and shall semi-annually draw and entitle said sinking fund to the same amount of interest as the bonds so cancelled would have done, and for the same purposes.

It is understood and agreed by and between the parties hereto that no individual liability shall attach to any stockholder of the party of the first part in behalf of any of the holders of any of the bonds secured by this mortgage or deed of trust, and that the holders of said bonds rely solely on the property, rights, and franchises of the party of the first part covered by this mortgage, and the stipulations and covenants of the said party of the first part herein contained, for the payment of the principal and interest of the bonds so held by them.

In witness whereof, the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, has caused these presents to be executed and signed by the president of this company, and attested by their secretary in their behalf and for the said company, and has caused the corporate seal of the company to be hereunto affixed the day and year above written.

44 And the parties of the second part have hereunto set their hands and affixed their seals the same day and year aforesaid.

[SEAL.] CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON,
President.

F. E. JONES,
Secretary.

[SEAL.] WILLIAM R. FOSDICK.
[SEAL.] JAMES D. FISH.

Executed in presence of—
GEORGE P. ANDREWS.
JOHN GARDNER.

STATE OF NEW YORK,
City and County of New York, ss:

Before me, the undersigned, a notary public of the State of New York, in the city of New York, duly commissioned and qualified, personally came this day William D. Judson, known to me to be the president of the Chicago, Danville and Vincennes Railroad Company, the party of the first part in the above deed of trust, and who executed the same on behalf of said company, and acknowledged that the said railroad company, and he, as the president of said company, and in its behalf, did sign, seal, and deliver the said indenture and deed of trust, as and for its own act and deed, and for the use and purposes therein mentioned.

Also came before me, at the same time, the above-named William R. Fosdick and James D. Fish, trustees, and the party of the second part in the foregoing mortgage and deed of trust, and both personally known to me as the same persons who signed the same, and each ac-

45 knowledged that he did sign, seal, and execute the same for the uses and purposes herein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this thirteenth day of March, anno Domini 1869.

[NOTARIAL SEAL.] GEORGE P. ANDREWS,
Notary Public, New York City and County.

Filed for record, April 14th, 1869, at 3 o'clock p. m.
NOEL BROSSEAU,
Recorder.

STATE OF ILLINOIS,
Kankakee County, ss:

I, George R. Letourneau, clerk of the circuit court and ex-officio recorder for said county of Kankakee, in said State, do hereby certify that the foregoing is a true copy of the record of a certain mortgage recorded in the record of said county, in my office, on the 14th day of April, 1869, in record book No. 51, pages 518, 519, 520, 521, 522, 523, 524, 525, 526, and 527, the parties to said mortgage being the Chicago, Danville and Vincennes Railroad Company, mortgagor, and William R. Fosdick and James D. Fish, trustees.

In witness whereof I have hereunto set my hand and the seal of said court this 13th day of November, A. D. 1874.

[SEAL.] GEORGE R. LETOURNEAU,
Clerk of Circuit Court and Ex-officio Recorder.

46 *First mortgage of the Chicago, Danville & Vincennes Railroad Company, Indiana Division.*

47 FORM OF MORTGAGE.

This indenture, made this twelfth day of March, in the year one thousand eight hundred and seventy-two, between the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, party of the first part, and William R. Fosdick and James D. Fish, of the city and State of New York, trustees upon certain trusts hereinafter specified and provided, the party of the second part.

Whereas the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, under and in pursuance of the provisions of the acts incorporating the same, has commenced to construct and put in operation that division of its railroad situate, lying, and being in the State of Indiana, commencing on the boundary-line between said States of Illinois and Indiana, in the township of Marshfield, and county of Warren, in the State of Indiana, at the point where it connects with the road of said party of the first part, terminating on the eastern boundary-line of the State of Illinois, in the town of Ross, in Vermil'ion County, in said last-named State, and distant about ten miles southeasterly from the village of Rossville, extending thence in a southeasterly direction to Covington, in Fountain County, thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also, a branch road, extending from the main line be-
48 fore described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg, in said county, and is now engaged in constructing the same;

And, for the purpose aforesaid, needs, and has resolved to purchase and transport iron rails, chairs, spikes, and other iron and materials necessary therefor, and engines, cars, and other rolling-stock and ma-

chinery to be used thereon, and to borrow a portion of the money necessary to make such purchases, and to pay for such transportation, and the construction, completion, and equipment of said road;

And whereas, at a meeting of the board of directors of the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, held, pursuant to law, on the eleventh day of March, in the year 1872, the said board of directors resolved and enacted an order and resolutions as follows, to wit:

"Resolved, That, to aid in providing the means required for the construction and equipment of that division of this company's road situate, lying, and being in the State of Indiana, an issue of bonds shall be made by the company amounting to one million and five hundred thousand dollars, each bond to be for the sum of $1,000, and to bear seven per cent. per annum interest, payable semi-annually, on the first days of April and October in each year, and the principal to be payable on the first day of April, 1912, and both principal and interest to be payable in United States gold coin, in the city of New York, and each bond to contain an express waiver of all recourse by the holder of the same to any individual liability of the stockholders of the company.

"That said bonds shall be dated as made on the twelfth day of March, A. D. 1872.

"In case default be made in the payment of any half year's interest on any of said bonds, and the warrant for said interest shall have been presented and its payment demanded, and such default shall have con-
49 tinued for six months after such demand without the consent of the holder of said coupon or bond, then and thereupon the principal of all such bonds shall become immediately due and payable. That a warrant for each semi-annual payment of interest shall be made and authenticated for and on behalf of this company by the secretary of this company, and annexed to each bond. That said bonds shall be prepared by the president of the company, and signed by him for and on behalf of this company, and attested by the treasurer, and shall have annexed to them a certificate of authentication of the trustee or trustees under the mortgage made to secure them and shall not be issued or obligatory without such certificate. That from and after the first day of April, A. D. 1876, and until the maturity of said bonds, there shall be annually created, paid, and deposited with a sinking-fund commissioner or commissioners, to be appointed by the board of directors, and to hold office at the pleasure of the board, a sinking fund, to aid in the final redemption of said bonds, of an amount of money derived from the net earnings of said road and property equal to one-half of one per cent. on the whole amount of said issue of bonds at the time of any such payment outstanding. Said fund, and all investments and accounts thereof, and its management shall always be under the control of this board, and shall be from time to time continually invested by the commissioner or commissioners in the purchase of said bonds, or bonds of the Government of the United States, or of the States of Illinois and Indiana; and the interest on all such investments as collected shall be added to and continualy compounded with said fund, and the same shall be used and appropriated solely to redeem and eventually pay off said issue of bonds hereby provided to be made.

"No bond of said issue purchased by said fund shall thereby be cancelled, but shall, with its coupons, be stamped as owned by said sinking fund, and it, or its amount if destroyed, shall remain a liability
50 against the company, and the interest shall be paid to the said sink-

ing fund the same as paid on other bonds, and shall be added to said fund until the whole of said issue of bonds shall have been absorbed or otherwise paid off, when the whole issue shall be cancelled. Any bonds of said issue which may be in said sinking fund at any time may be destroyed by order of the board of directiors of said company; but in such case the semi-annually accruing interest on the amount so destroyed must thereafter be paid to said sinking fund. The bonds and securities belonging to the sinking fund shall be kept in the office of the sinking-fund commissioner or commissioners, which shall be at or near the principal office of said railroad company.

"That for the purpose of securing the final payment of said issue of $1,500,000 of bonds, with all interest to accrue thereon, this company will make and deliver to William R. Fosdick and James D. Fish, as trustees, a mortgage and deed of trust, conveying to said persons, as trustees, for the benefit of every holder of such bonds, or any of them, all that division of the road of this company, situate, lying and being in the State of Indiana, commencing on the boundary line between the States of Illinois and Indiana, in the township of Marshfield, and county of Warren, in the State of Indiana, at the point where it connects with the road of this company, terminating on the eastern boundary line of the State of Illinois, in the town of Ross, in Vermilion County, in said last-named State, and distant about ten miles southeasterly from the village of Rossville; extending thence in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County; and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad. Also a branch road extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to
51 the village of Newburg, in said county, the entire length of road being about eighty miles; and also all such additional branch roads as this company may hereafter construct for the purpose of extending its tracks into the coal and mining regions in the vicinity of its said main lines of road, with all the property, rights, and franchises of this company, of every kind and description whatever, pertinent to said road between said terminal points, and all the income to be had and derived from operating the same, in trust, to secure the final payment of said bonds as aforesaid, with all the rights, covenants, powers, and authority, in case default be made by this company in such payments as in said deed of trust shall be specified, to foreclose said mortgage, and to sell the property so mortgaged, or to take possession of and operate the same, and receive the incomes thereof; but not in any case, before any default, to disturb or interfere with this company in the possession, control, and management thereof, or from receiving the incomes thereof, or from selling or exchanging any of the personal property or machinery or equipments thereof, or any of the lands or real estate not necessary for the use and operation of the railroad; as to all of which, as will be in said mortgage and deed of trust specifically stated, agreed upon, and set forth. That the president of this company is hereby authorized and fully empowered to make and sign and execute and seal with the corporate seal of this company the said mortgage and deed of trust, and to acknowledge the same for and on behalf of this company for record; and on the acceptance of said trust and signing the said deed by the said trustees to cause the same to be recorded according to law, and thereupon to make, sign, execute, and prepare said

$1,500,000 of bonds for issue and sale, as shall be hereafter ordered by this board."

And whereas the said Chicago, Danville and Vincennes Railroad Company, party of the first part, hath, in accordance with the pro-
52 visions of said order and resolution, made and executed bonds to the amount of one million and five hundred thousand dollars, of the form, denomination, and character prescribed by said order and resolution, and hold the same to be authenticated, issued, used, and disposed of for the purposes in said order and resolution stated:

Now, therefore, in further pursuance of said order and resolution, and to the end and purpose of securing and assuring the punctual payment of said one million and five hundred thousand dollars of bonds, and every part thereof, which may be issued to the persons who may become the holders of the same, or any of them, this indenture witnesseth, that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the said party of the second part, trustees as aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, doth hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the said William R. Fosdick and James D. Fish, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire division of the railroad of the party of the first part, situate, lying, and being in the State of Indiana, commencing on the boundary-line between the States of Illinois and Indiana, in the township of Marshfield and county of Warren, in the State of Indiana, at the point where it connects with the road of the party of the first part, terminating on the eastern boundary-line of the State of Illinois, in the town of Ross, in Vermilion County, in said last-named State, and distant about ten miles southeasterly from the village of Rossville, extending thence in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indian-
53 apolis Railroad. Also, a branch road extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, Fountain County, and extending in an easterly direction to the village of Newburg, in said county, the entire length of road being about eighty miles; and also all such additional branch roads as said party of the first part may hereafter construct, for the purpose of extending its track into the coal and mining regions in the vicinity of said main lines of road; with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its right of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has, or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever pertinent thereto; Provided, however, that this grant and conveyance aforesaid shall not include nor operate to transfer any lands, goods, chattels, property, machinery, equipments, or other matters, which said company now owns or may hereafter acquire, that need not be used for any purpose incident to the management or operation of said railway or the repair thereof, or in the business of said company; nor any franchises, power, or corporate

right to build that portion of the line of railroad which, by its charter, it is authorized to locate and construct, and not embraced within the terminal points hereinbefore described; but all of which last-mentioned franchises and right of way shall be wholly excepted and exempt from these presents and the grant and conveyance herein specified; nor shall these presents in any way prohibit the party of the first part from selling or conveying, or otherwise disposing of the same, and all the proceeds thereof; nor from receiving, using, and applying any
54 money or personal property of said company to the repairs of said road or its appurtenances, or to its current expenses, or to the purchase of necessary machinery, or the renewal thereof; and the board of directors of said company may likewise distribute and pay any net annual incomes and profits to stockholders, after paying the interest on the said bonds and providing for any sinking fund required to be created and kept. To have and to hold the said railway property, premises, interests, rights, and appurtenances, mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance unto the said party of the second part, as such trustees as aforesaid, and to their successors in said trust, or assigns, to and for the only use, benefit, and behoof of the said trustees, and their cest'i que trust, their successors and assigns, forever; but in special trust and confidence, and upon the conditions following, that is to say:

First. That this conveyance is for, and shall be by the said party of the second part, their successors and assigns, held, used, and owned solely for, the benefit and protection and security of the persons and corporations who shall hold and own the bonds about to be issued as aforesaid by the party of the first part, and for enforcing the stipulations of said company as to said issue of bonds and the disposal thereof, and securing the same and the final payment thereof, in their true intent and meaning, whether contained in said bonds or the interest-warrants attached to them or in this deed.

Second. That for the better assuring and confirming the title and powers of the said party of the second part, their successors and assigns, in the said premises and property hereby conveyed, and in and to any premises and property or rights hereafter accruing or to be acquired by the said party of the first part appurtenant to said railroad, which is intended to pass or be passed by this conveyance, the said party of the first part, their successors and assigns, will and shall,
55 as often as may be lawfully required by the party of the second part, or their successors or assigns, holding the above-granted trust, do such acts and make such other and further conveyances and assurances in law as such party of the second part shall, by counsel learned in the law, be advised are necessary for the better carrying out of the object of the parties to this mortgage or deed of trust.

Third. That if the said party of the first part, their successors or assigns, shall well and truly pay to the holders of said one million and five hundred thousand dollars of bonds, so to be issued and hereby secured, the respective sums of money and interest due and accruing on said bonds on the days and times therein mentioned, and according to the tenor and effect of said bonds, then and thenceforth this indenture, and all the estate hereby granted, shall become and be utterly void and of no further effect; and the same shall be, by such payment, wholly annulled and satisfied, without any further receipt or entry of satisfaction of record whatever, but shall be, if required, entered and certified on any record of the same as so satisfied by the party of the second part or their successors.

Fourth. That until default shall have been made by the party of the first part in the payment of principal or interest of the said bonds or some of them, or until default shall have been made in respect to something herein required to be done by the said party of the first, the said party of the first part shall be suffered and permitted to possess, use, occupy, manage, and operate the said railroad, property, and franchises, and appurtenances, and to renew, replace, and repair the same and every part thereof, and take and receive and use the tolls, rents, issues, incomes, and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

Fifth. In case default shall be made in the payment of any interest on any of the aforesaid bonds issued or to be issued, according to the tenor of the coupons thereto annexed, or of the provisions hereof;
56 or in case default shall be made in the payment of the principal of said bonds, or any of them, when the same shall become due, without the consent of the holder of such bond on which such default shall occur, the said party of the first part hereby covenants and agrees to and with the party of the second part, and their successors and assigns, that within six months after such default shall have occurred, the same default still continuing, the said party of the first part, on demand of the said trustee or trustees for the time being, shall and will surrender to him or them, or to their agent, the actual possession of the herein granted and demised railroad and premises, together with all the books, records, papers, accounts, and money of said company, and all management and control thereof; and that all the expenses of taking, holding, managing, and operating said property, if possession be so taken, shall be paid from the income and profits thereof; and if said property shall, after such taking possession thereof, be sold, then from the sale thereof; or such expenses may be paid from the sale of any personal property, as the said trustees may deem proper: and that said party of the second part, and their successors, having taken such possession, may manage, operate, and control said road and property and all of its affairs, and appoint all needful agents and employees for that purpose, and pay the same, and receive all the incomes, issues, and profits thereof, and apply the same to the payment of the said interest so in default, according to the true intent and tenor of the said bonds and the coupons annexed, and to the terms of this deed, until such default shall have been satisfied, if such incomes and profits will satisfy the same, first paying all expenses of such possession and management, and all taxes, assessments, and charges on said property, and a just compensation for their own services as such trustees. But in any and all cases of such taking of possession by said party of the second part, and paying up any such default, and the expenses aforesaid,
57 the said party of the second part shall immediately thereafter redeliver the said railway and premises, books, records, and money and accounts into the possession of the party of the first part: Provided, that no such demand for such possession shall be made by said trustee or trustees until they shall have been required by the holders of at least the one-half of all of the said issue of bonds which shall then be unpaid and outstanding to make such demand and to take such possession of said road and property.

Sixth. That in case default shall be made as aforesaid, and shall continue as aforesaid, it shall be lawful for the party of the second part, or their successors in said trust, after entry as aforesaid, or other entry, or without entry, personally or by agent or attorney, to sell and dispose of, to the highest bidder, all and singular the premises hereby con-

veyed or intended so to be, as an entirety, at public auction, in the city of Indianapolis, State of Indiana, at such time as said party of the second part may appoint, first having demanded of the party of the first part full payment of all money then in default, and also first having given sixty days' notice of such time and place of sale, and a full description of the property so to be sold, by advertisement thereof in two newspapers, one published in Indianapolis, in the State of Indiana, and one published in the city of New York, and to adjourn said sale from time to time, in their discretion, and, if adjourned, to make such sale in manner aforesaid, without further notice, at the time and place to which it may be so adjourned; and upon such sale, and receiving the purchase-money therefor, to convey the same, by good and sufficient conveyances, to the purchaser or purchasers; and such sale and conveyance so made shall convey all the right, title, estate, interest, and property of the said party of the first part of, in, and to the said road, premises, franchises, and property to the said purchaser, in fee-simple, forever, and shall be a perpetual bar, both in law and equity, against the said party of
58 the first part, and their successors and assigns, and against all and every person claiming or to claim the said premises, or any part thereof, under them, forever. After deducting from the proceeds of such sale the expenses of the sale and conveyance, and all advances or liabilities which may have been made or incurred by the party of the second part in operating and controlling and maintaining the said railroad and property, and in managing its business and affairs while in possession, and all payments for taxes, charges, and assessments on said premises, or any part thereof, as well as reasonable compensation for their own services, to apply the proceeds of such sale to the payment of the interest of said one million and five hundred thousand dollars of bonds, or so many of them as shall have been issued by said party of the first part, and be then outstanding, pro rata, until all such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds, pro rata, until such principal shall be paid; and if any surplus remain after paying all of said matters, to pay such surplus to the party of the first part; and such payments shall be so made on said bonds whether the same shall have become due or not at the time of such sale: Provided, that said trustee or trustees may, in their discretion, sell the said premises as an entirety, and in doing so shall make legal distribution of the proceeds of such sale accordingly.

It is hereby declared that the receipt of said trustee or trustees making any such sale to the purchaser of the premises for the purchase-money shall be a full and sufficient discharge of such purchaser therefor; and that said purchaser shall not, after payment of said purchase-money, and obtaining such receipt therefor, be liable, or in any way bound, to see said purchase-money applied to this trust, or otherwise, or in any manner answerable for its loss or misapplication, or obliged to inquire into the authority for making such sale.

Seventh. At any sale of the property aforesaid, or any part
59 thereof, made by virtue of these presents, or by judicial authority, the said trustee or trustees may bid for and purchase, or cause to be purchased, the property so sold, or any part of it, in behalf of the holders of said bonds, secured by this deed, then outstanding, at a reasonable price, if only a part be sold; but if the whole property be sold, at a price not exceeding the whole amount of said bonds and interest then outstanding.

Eighth. If default be made by the party of the first part in the pay-

ment of any half year's interest on any of said bonds, and the warrant or coupon for such interest shall have been presented and its payment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all of the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and upon the written request of the holders of a majority of the said bonds then outstanding shall proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property or otherwise, as herein provided.

Ninth. It is hereby mutually agreed by the parties hereto that the trustees shall be responsible only for gross negligence and willful default, and that they shall not be bound to do any act touching the execution of the trust, except at their own option, which may involve them in personal expense or liability, unless first duly and satisfactorily indemnified against the same by one or more of said bondholders.

In case of the death, resignation or inability to act of any trustee, the board of directors may appoint a successor, and failing to so appoint, any court of competent jurisdiction may appoint a trustee to fill such vacancy, on the application of the holders of one-sixth part of
60 the bonds hereby intended to be secured, then outstanding, and such appointment by the board, or by such court, shall invest the trustees so appointed with all the interest, estate, power and authority in the premises, and subject him or them to the same obligations hereby given and granted to the party of the second part herein.

And the said party of the first part hereby further covenants and agrees with the part of the second part, and their successors, and with the holders of each and all of the said issue of one million and five hundred thousand dollars of bonds which may be issued, that the said party of the first part will create and make a sinking-fund for the redemption of such bonds, and each of them, by setting aside and depositing with a sinking-fund commissioner or commissioners, to be appointed by the party of the first part for that purpose, from and after the first day of April, in the year 1876, and annually thereafter, until the maturity of said bonds, from the net earnings of the said road and property, after the payment of all the interest on said bonds, an amount of money equal to the one-half of one per cent. of the principal amount of such bonds hereby secured, which shall then be outstanding. Such sinking-fund moneys shall, from time to time, under the orders of the party of the first part, be invested in the purchase of the bonds so issued, or in bonds of the Government of the United States, or of the States of Illinois and Indiana; and the money accruing on any and all of such investments for interest, as fast as the same shall be received, shall be added to and paid into the sinking-fund, and compounded therein continually, and reinvested, in like manner, with the other money of said fund, and the same shall be used solely to redeem and eventually pay off said bonds herein and hereby secured.

That the board of directors of said railway company, party of the first part, shall have entire control over the management of said sinking-fund, and every person in charge of or connected with the same,
61 and shall, from time to time, direct in what bonds or securities it shall be invested, and at what prices or rates, and how it shall be kept and the manner of keeping the accounts thereof; and shall require

ample security to be given to them by any person in charge of its moneys, or its securities or bonds, for its safe-keeping.

Every bond of the said issue which may be purchased and held by said sinking fund shall remain in full force until the whole of such issue shall have matured, or shall have been so absorbed or otherwise redeemed by said party of the first part, or until cancelled, as hereinafter provided; and the interest on such bonds held by said sinking fund shall be paid by said railroad company regularly, as the interest on its other similar bonds is paid; and such bonds so in the sinking fund shall, as to the annual amount of money to be paid from net earnings into said fund, be regarded as outstanding.

At the annual meeting of the stockholders in the year 1877, and at each annual meeting thereafter, all bonds of said issue and the coupons thereon then being in the sinking fund, purchased by said fund as aforesaid, shall be withdrawn from said fund and cancelled, and so certified by the commissioner and treasurer of the company, and the signatures thereto mutilated; and in place thereof the treasurer of the company shall give to the commissioner a receipt therefor, specifying the same and such cancellation, which receipt shall be filed in the office of said fund, and shall semi-annually draw and entitle said sinking fund to the same amount of interest as the bonds so cancelled would have done, and for the same purposes.

It is understood and agreed by and between the parties hereto that no individual liability shall attach to any stockholders of the party of the first part in behalf of the holders of any of *any of* the bonds secured by this mortgage or deed of trust, and that the holders of said bonds
62 rely solely on the property, rights and franchises of the party of the first part covered by this mortgage, and the stipulations and covenants of the said party of the first part herein contained, for the payment of the principal and interest of the bonds so held by them.

In witness whereof the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, has caused these presents to be executed and signed by the president of their company, and attested by their secretary in their behalf and for the said company, and has caused the corporate seal of the company to be hereto affixed the day and year first above written. And the parties of the second part have hereunto set their hands and affixed their seals the same day and year aforesaid.

CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON,
President.

[SEAL.] J. S. CAMPBELL,
Secretary.

[SEAL.] WILLIAM R. FOSDICK,
[SEAL.] JAMES D. FISH,
Trustees.

Executed in presence of—
RICH'D N. WHITLOCK.
H. A. GILDERSLEEVE.

STATE OF NEW YORK,
City and County of New York, ss:

Before me, the undersigned, a notary public of the State of New York, in the city of New York, duly commissioned and qualified, came this day William D. Judson, to me personally known, and also known by me to be the president of the Chicago, Danville and Vincennes Rail-

road Company, the party of the first part in the above deed of trust, and who executed the same on behalf of said company, and acknowledged that the said railroad company and he, as the president of
63 said company and in its behalf, did sign, seal, and deliver the said indenture and deed of trust as and for its own act and deed, and for the uses and purposes therein mentioned.

Also personally appeared before me, at the same time, the above-named William R. Fosdick, one of the trustees and one of the parties of the second part in the foregoing mortgage and deed of trust, and personally known to me as the person who signed the same as such, and acknowledged that he did sign, seal, and execute the same for the uses and purposes herein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this thirteenth day of March, anno Domini 1872.

[SEAL.] H. A. GILDERSLEEVE,
Notary Public, New York City and County.

STATE OF ILLINOIS,
County of Cook, ss:

Before me, the undersigned, a notary public of the State of Illinois, in the county of Cook, in the city of Chicago, duly commissioned and qualified, came James D. Fish, to me personally known, and one of the trustees, and one of the parties of the second part in the foregoing mortgage and deed of trust, and personally known to me as the person who signed the same as such, and acknowledged that he did sign, seal, and execute the same, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 15th day of March, anno Domini 1872.

[SEAL.] JOHN B. ADAMS,
Notary Public in the City of Chicago and County of Cook.

64 *Supplemental mortgage of the Chicago, Danville & Vincennes Railroad Company, including both Illinois and Indiana divisions. April 24th*, 1872.

65 This indenture, made this twenty-fourth day of April, in the year one thousand eight hundred and seventy-two, between the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, party of the first part, and William R. Fosdick and James D. Fish, of the city and State of New York, trustees, upon certain trusts hereinafter specified and provided, the party of the second part.

Whereas the Chicago, Danville and Vincennes Railroad Company has heretofore issued, sold, and disposed of two thousand and five hundred of its first-mortgage bonds, of one thousand dollars each, numbered from No. one (1) to two thousand and five hundred (2,500), both inclusive, amounting in the aggregate to two millions and five hundred thousand dollars, which bonds are dated the tenth day of March, A. D. 1869, are due and payable on the first day of April, A. D. 1909, with semi-annual interest coupons attached thereto, payable on the first days of April and October in each year, until the maturity of said bonds, and both principal and interest payable in United States gold coin, and all of which bonds are now outstanding and unpaid;

And whereas said corporation, in order to secure the payment of the principal and interest of the said two millions and five hundred thousand dollars of bonds, did, under date of the tenth day of March, A. D.

1869, aforesaid, make and execute a certain mortgage or deed of trust to William R. Fosdick and James D. Fish, trustees, conveying to them, as said trustees, that division of the road of said corporation
66 situate, lying, and being in the counties of Cook, Will, Kankakee, Iroquois, and Vermilion, in the State of Illinois, together with certain other property of said corporation, reference being had to the mortgage or deed of trust aforesaid, which is recorded in the several counties mentioned therein, for a more full description of the premises and property so conveyed, and embraced in said deed of trust, and for all other and further provisions contained therein;

And whereas the Chicago, Danville and Vincennes Railroad Company have made and executed certain other of its first-mortgage bonds, of one thousand dollars each, numbered from number two thousand five hundred and one (2,501) to four thousand (4,000), both inclusive, amounting in the aggregate to one million and five hundred thousand dollars, which bonds are dated on the 12th day of March, A. D. 1872, are due and payable on the first day of April, A. D. 1912, with semi-annual interest coupons attached thereto, payable on the first days of April and October in each year, until the maturity of said bonds, and both principal and interest payable in United States gold coin, and which bonds said company are now about to sell and dispose of, for the purpose of providing a portion of the means required for the construction and equipment of that division of its road situate in the State of Indiana;

And whereas said corporation, in order to secure the payment of the principal and interest of said last-mentioned one million and five hundred thousand dollars of bonds, did, under date of the twelfth day of March, A. D. 1872, aforesaid, make and execute a certain other mortgage or deed of trust to William R. Fosdick and James D. Fish, trustees, conveying to them, as said trustees, that division of the road of said corporation, situate, lying, and being in the counties of Warren, Fountain, Parke, and Clay, in the State of Indiana, together with certain other property of said corporation, reference being had to the mortgage or deed of trust aforesaid, which is recorded in the sev-
67 eral counties mentioned therein, for a more full description of the premises and property so conveyed and embraced in said deed of trust, and for all other and further provisions contained therein:

Now, for the purpose of more fully securing and assuring the punctual payment of the said two millions and five hundred thousand dollars of bonds, before mentioned, numbered from number 1 to number 2,500, both inclusive, and dated the tenth day of March, A. D. 1869, and due and payable on the first day of April, A. D. 1909, and every part thereof, and the interest thereon, to the persons who may become the holders of the same, or any of them—

This indenture witnesseth that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the party of the second part, trustee as aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, in addition to the conveyance made by it to said party of the second part, by the indenture aforesaid, dated March 10, A. D. 1869, doth hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the said William R. Fosdick and James D. Fish, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire division of the railroad of the party of the first part, situate, lying, and being in the State of Indiana, commencing on the boundary-line between the States of Illinois and Indi-

ana, in the township of Marshfield and county of Warren, in the State of Indiana, at the point where it connects with the road of the party of the first part, terminating on the eastern boundary-line of the State of Illinois, in the town of Ross, in Vermilion County, in said last-named State, and distant about ten miles southeasterly from the village of Rossville, extending thence in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke
68 County, and thence southeasterly, to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad. Also, a branch road extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg, in said county, the entire length of road being about eighty miles; and also all such additional branch roads as said party of the first part may hereafter construct in the State of Indiana, for the purpose of extending its tracks into the coal and mining regions in the vicinity of said main lines of road; with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire, either by law or equity, of every kind whatever pertinent thereto:

To have and to hold the said railway property, premises, interests, rights, and appurtenances mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance, unto the said party of the second part, as such trustees as aforesaid, and to their successors in said trust, or assigns, to and for the only use, benefit, and behoof of the said trustees, and their cestui que trust, their successors and assigns forever; subject, however, to the prior lien provided for in a certain mortgage or deed of trust made by the party of the first part hereto to the party of the second part hereto, dated March 12th, 1872, to secure one million and five hundred thousand dollars of bonds, to be issued by the party of the first part, and hereinbefore referred to.

69 And for the purpose of more fully securing and assuring the punctual payment of the said one million and five hundred thousand dollars of bonds before mentioned, numbered from number 2,501 to number 4,000, both inclusive, and dated the 12th day of March, A. D. 1872, and due and payable on the first day of April, A. D. 1912, and every part thereof, and the interest thereon, to the persons who may become the holders of the same, or any of them:

This indenture further witnesseth that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the said party of the second part, trustees as aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, in addition to the conveyance made by it to said party of the second part by the indenture aforesaid, dated March 12th, A. D. 1872, doth hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the said William H. Fosdick and James D. Fish, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire railroad of the party

of the first part, lying, being, and extending from its terminus, in the city of Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermilion, to the city of Danville, being in length about one hundred and thirty miles, with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has or owns and possesses, or may
70 hereafter acquire, either in law or equity, of every kind whatever pertinent thereto: To have and to hold the said railway property, premises, interests, rights and appurtenances mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance, unto the said party of the second part, as such trustees aforesaid, and to their successors in said trust, or assigns, to and for the only use, benefit, and behoof of the trustees, and their cestui que trust, their successors and assigns forever; subject, however, to a prior lien, provided for in a certain mortgage or deed of trust made by the party of the first part hereto to the party of the second part hereto, dated March 10th, A. D. 1869, to secure two millions and five hundred thousand dollars of bonds issued by the party of the first part, and hereinbefore referred to.

It is provided, however, that the grants and conveyances hereinbefore contained shall not include, nor operate to transfer, any lands, goods, chattels, property, machinery, equipments, or other matters which said company now owns, or may hereafter acquire, that need not be used for any purpose incident to the management or operation of said railway, or the repair thereof, or in the business of said railway company; nor any franchises, power, or corporate right to build that portion of the line of railroad which, by its charter, it is authorized to locate and construct, and not embraced within the terminal points hereinbefore described; but all which last-mentioned franchises and right of way shall be wholly excepted and exempt from these presents, and the grant and conveyance herein specified; nor shall these presents in any way prohibit the party of the first part from selling and conveying, or otherwise disposing of the same, and all the proceeds thereof; nor from receiving, using, and applying any money or personal property of said company to the repairs of said road or its appurtenances, or to its current expenses, or to the purchase of necessary machinery, or the renewal thereof; and the board of directors of said company
71 may likewise distribute and pay any net annual incomes and profits to stockholders, after paying the interest on the said bonds, and providing for any sinking-fund required to be created and kept. It is further provided that all the property herein and hereby conveyed to the party of the second part shall be held by them in special trust and confidence, and upon the conditions following, that is to say:

First. That these conveyances are for, and shall be by the said party of the second part, their successors and assigns, held, used, and owned solely for the benefit and protection and security of the persons and corporations who shall hold and own the bonds issued as aforesaid, by the party of the first part, and for enforcing the stipulations of said company as to said issue of bonds, and the disposal thereof, and securing to the same, and the final payment thereof, in their true intent and

meaning, whether contained in said bonds, or the interest-warrants attached to them, or in this deed.

Second. That for the better assuring and confirming the title and powers of the said party of the second part, their successors and assigns, in the said premises and property hereby conveyed, and in and to any premises and property or rights hereafter accruing, or to be acquired by said party of the first part, appurtenant to said railroad, which is intended to pass or be passed by this conveyance, the said party of the first part, their successors and assigns, will and shall, as often as may be lawfully required by the party of the second part, or their successors or assigns, holding the above-granted trust, do such acts and make such other and further conveyances and assurances in law as such party of the second part shall, by counsel learned in the law, be advised are necessary for the better carrying out of the object of the parties to this mortgage or deed of trust.

Third. That if the said party of the first part, their successors or assigns, shall well and truly pay to the holders of said bonds so is-
72 sued and secured the respective sums of money and interest due and accruing on said bonds on the days and times therein mentioned, and according to the tenor and effect of said bonds, then and thenceforth this indenture, and all the estate hereby granted, shall become and be utterly void and of no further effect, and the same shall be, by such payment, wholly annulled and satisfied, without any further receipt or entry of satisfaction of record whatever, but shall be, if required, entered and certified on any record of the same, as so satisfied, by the party of the second part or their successors.

Fourth. That until default shall have been made by the party of the first part in the payment of principal or interest of the said bonds, or some of them, or until default shall have been made in respect to something herein required to be done by the said party of the first part, the said party of the first part shall be suffered and permitted to possess, use, occupy, manage, and operate the said railroad, property, and franchises and appurtenances, and to renew, replace, and repair the same, and every part thereof, and take and receive and use the tolls, rents, issues, incomes, and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

Fifth. In case default shall be made in the payment of any interest on any of the aforesaid bonds issued or to be issued, according to the tenor of the coupons thereto annexed, or of the provisions hereof, or in case default shall be made in the payment of the principal of said bonds, or any of them, when the same shall become due, without the consent of the holder of such bond on which such default shall occur, the said party of the first part hereby covenants and agrees to and with the party of the second part, and their successors and assigns, that within six months after such default shall have occurred, the same default still continuing, the said party of the first part, on demand of the said trustee or trustees for the time being, shall and will sur-
render to him or them, or their agent, the actual possession
73 of the herein granted and demised railroad and premises, together with all the books, records, papers, accounts, and money of said company, and all management and control thereof; and that all the expenses of taking, holding, managing, and operating said property, if possession be so taken, shall be paid from the incomes and profits thereof; and if said property shall, after such taking possession thereof, be sold, then from the sale thereof; or such expenses may be paid from the sale of any personal property, as the said trustees may

deem proper; and that said party of the second part, and their successors, having taken such possession, may manage, operate, and control said road and property, and all of its affairs, and appoint all needful agents and employees for that purpose, and pay the same, and receive all the incomes, issues, and profits thereof, and apply the same to the payment of the said interest so in default, according to the true intent and tenor of the said bonds and the coupons annexed, and to the terms of this deed, until such default shall have been satisfied, if such incomes and profits will satisfy the same—first paying all expenses of such possession and management, and all taxes, assessments, and charges on said property, and a just compensation for their own services as such trustees. But in any and all cases of such taking of possession by said party of the second part, and paying up any such default, and the expenses aforesaid, the said party of the second part shall immediately thereafter redeliver the said railway and premises, books, records, and money and accounts into the possession of the party of the first part: Provided, That no such demand for such possession shall be made by said trustee or trustees until they shall have been required by the holders of at least the one-half of all of the said issue of bonds which shall then be unpaid and outstanding to make such demand and to take such possession of said road and property.

74 Sixth. That in case default shall be made as aforesaid, and shall continue as aforesaid, it shall be lawful for the party of the second part, or their successors in said trust, after entry as aforesaid, or other entry, or without entry, personally, or by agent or attorney, to sell and dispose of, to the highest bidder, all and singular the premises hereby conveyed, or intended so to be, at public auction, in the city of Chicago, in the State of Illinois, or in the city of Indianapolis, in the State of Indiana, at such time as said party of the second part may appoint, first having demanded of the party of the first part full payment of all money then in default; and also first having given sixty days' notice of such time and place of sale, and a full description of the property so to be sold, by advertisement thereof in three newspapers; one published in Chicago, in the State of Illinois, one published in Indianapolis, in the State of Indiana, and one published in the city of New York; and to adjourn said sale from time to time, in their discretion, and, if adjourned, to make such sale in manner aforesaid, without further notice, at the time and place to which it may be adjourned; and upon such sale, and receiving the purchase-money therefor, to convey the same, by good and sufficient conveyances, to the purchaser or purchasers; and such sale and conveyance so made shall convey all the right, title, estate, interest, and property of the said party of the first part, of, in, and to the said road, premises, franchises, and property, to the said purchaser, in fee-simple, forever, and shall be a perpetual bar, both in law and equity, against the said party of the first part, and their successors and assigns, and against all and every person claiming or to claim the said premises, or any part thereof, under them, forever. After deducting from the proceeds of such sale the expenses of the sale and conveyance, and all advances or liabilities which may have been made or incurred by the party of the second part in operating and controlling and maintaining the said railroad and property, and in managing its business and affairs while in possession, and all

75 payments for taxes, charges, and assessments on said premises, or any part thereof, as well as reasonable compensation for their own services, to apply the proceeds of such sale to the payment of the interest on said bonds, or so many of them as shall have been issued

by said party of the first part, and be then outstanding, pro rata, until all such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds, pro rata, until such principal shall be paid; and if any surplus remain after paying all of said matters, to pay such surplus to the party of the first part; and such payments shall be so made on said bonds, whether the same shall have become due or not at the time of such sale.

It is hereby declared that the receipt of said trustee or trustees making any such sale, to the purchaser of the premises, for the purchase-money, shall be a full and sufficient discharge of such purchaser therefor, and that said purchaser shall not after payment of said purchase-money, and obtaining such receipt therefor, be liable, or in any way bound, to see said purchase-money applied to this trust, or otherwise, or in any manner answerable for its loss or misapplication, or obliged to inquire into the authority for making such sale.

Seventh. At any sale of the property aforesaid, or any part thereof, made by virtue of these presents, or by judicial authority, the said trustee or trustees may bid for and purchase, or cause to be purchased, the property so sold, or any part of it, in behalf of the holders of said bonds secured by this deed then outstanding, at a reasonable price, if only a part be sold; but if the whole property be sold, at a price not exceeding the whole amount of said bonds and interest then outstanding.

Eighth. If default be made by the party of the first part in the payment of any half year's interest on any of said bonds, and the warrant or coupon for such interest shall have been presented, and its pay-
76 ment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all of the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both the principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as herein provided.

Ninth. It is hereby mutually agreed by the parties hereto, that the trustees shall be responsible only for gross negligence and willful default, and that they shall not be bound to do any act touching the execution of the trust, except at their own option, which may involve them in personal expense or liability, unless first duly and satisfactorily indemnified against the same by one or more of said bondholders.

In case of the death, resignation, or inability to act of any trustee, the board of directors may appoint a successor, and failing to so appoint, any court of competent jurisdiction may appoint a trustee to fill such vacancy, on the application of the holders of the one-sixth part of the bonds hereby intended to be secured, then outstanding, and such appointment by the board or by such court shall invest the trustees so appointed with all the interest, estate, power, and authority in the premises, and subject him or them to the same obligations hereby given and granted to the party of the second part herein.

The foregoing grants, conveyances, and covenants in this indenture contained are made and entered into by the Chicago, Danville and Vincennes Railroad Company, party of the first part hereto, upon the express understanding, agreement, and condition that in case the party of

the first part, or its successors or assigns, shall deem it necessary or
77 desirable, at any future time, in consequence of an increase of the traffic of the said railroad, to issue and dispose of any amount of bonds, or other evidences of indebtedness, for the purpose of providing the means for the purchase of additional rolling stock and equipment for the use of said railroad, or of said company, its successors or assigns, or for the improvement of said railroad or property, that then, and in that case, the said Chicago, Danville and Vincennes Railroad Company, its successors or assigns, may secure the payment of the principal and interest of such bonds, or other evidences of indebtedness so issued and disposed of, by mortgage upon all the roads and property of said company hereinbefore mentioned and described, and that such mortgage, when so made and executed, shall constitute, and be and become, a lien upon all said roads and property prior to, and having precedence of, the liens hereinbefore provided for by this instrument.

In witness whereof the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, has caused these presents to be executed and signed by the president of their company, and attested by their secretary, in their behalf and for the said company, and has caused the corporate seal of the company to be hereto affixed, the day and year first above written. And the parties of the second part have hereunto set their hands and affixed their seals the same day and year aforesaid.

[SEAL.] CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON,
President.

[SEAL.] WILLIAM R. FOSDICK,
[SEAL.] JAMES D. FISH,
Trustees.

Attest:
J. S. CAMPBELL, *Secretary.*

78 STATE OF NEW YORK,
City and County of New York, ss:

Before me, the undersigned, a notary public of the State of New York, in the city of New York, duly commissioned and qualified, came this day William D. Judson, to me personally known, and also known by me to be the president of the Chicago, Danville and Vincennes Railroad Company, the party of the first part in the above deed of trust, and who executed the same on behalf of said company, and acknowledged that the said railroad company, and he, as the president of said company, and in its behalf, did sign, seal, and deliver the said indenture and deed o trust, as and for its own act and deed, and for the uses and purposes therein mentioned.

Also personally appeared before me at the same time the above-named William R. Fosdick and James D. Fish, trustees, and the party of the second part in the foregoing mortgage and deed of trust, and personally known to me as the persons who signed the same as such, and acknowledged that they did sign, seal, and execute the same for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this twenty-fifth day of April, anno Domini 1872.

[SEAL.] J. A. WELCH,
Notary Public, New York City and County.

79, 80 *Chicago, Danville & Vincennes Railroad Company. Mortgage to secure convertible mortgage bonds. December* 16, 1872.

81 FORM OF MORTGAGE.

This indenture, made this sixteenth day of December, in the year one thousand eight hundred and seventy-two, between the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, party of the first part, and James D. Fish and James W. Elwell, of the city and State of New York, trustees, upon certain trusts hereinafter specified and provided, the party of the second part.

Whereas the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, under and in pursuance of the provisions of the acts incorporating the same, are constructing and operating a railroad in said States, commencing at the city of Chicago and extending southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermilion, in Illinois, to the city of Danville, and also extending from a point on the line above described, distant about twelve miles north of Danville aforesaid, in a southeasterly direction to the boundary-line of the State of Indiana, and thence in said last-named State in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also a branch road extending from the main line before described, commencing at a point on said main line, distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg in said county, and is now engaged in constructing and operating the same.

82 And whereas, at a meeting of the board of directors of the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, held pursuant to law on the fourteenth day of December, in the year one thousand eight hundred and seventy-two, the said board of directors resolved and enacted an order and resolution as follows, to wit:

"Whereas, in consequence of an increase of the traffic of this company's road, it has become necessary to provide the means for the purchase of additional rolling-stock and equipment for the use of the company, and for the improvement of the company's road and property: Therefore,

"Resolved, That an issue of bonds shall be made by the company, designated 'Convertible mortgage bonds,' amounting to one million of dollars, eight hundred of said bonds to be for the sum of $1,000 each, and four hundred of said bonds to be for the sum of $500 each, all of said bonds to bear seven per cent. per annum interest, payable semi annually on the first days of February and August in each year, and the principal to be payable on the first day of February, 1893, and both principal and interest to be payable in United States gold coin in the city of New York; each bond to be convertible into the capital stock of the company at par, at any time before maturity, upon thirty days' written notice to the company, and each bond to contain an express waiver of all recourse by the holder of the same to any individual liability of the stockholders of this company.

"That said bonds shall be dated as made on the first day of January, A. D. 1873.

"In case default be made in the payment of any half year's interest

the first part, or its successors or assigns, shall deem it necessary or
77 desirable, at any future time, in consequence of an increase of the traffic of the said railroad, to issue and dispose of any amount of bonds, or other evidences of indebtedness, for the purpose of providing the means for the purchase of additional rolling stock and equipment for the use of said railroad, or of said company, its successors or assigns, or for the improvement of said railroad or property, that then, and in that case, the said Chicago, Danville and Vincennes Railroad Company, its successors or assigns, may secure the payment of the principal and interest of such bonds, or other evidences of indebtedness so issued and disposed of, by mortgage upon all the roads and property of said company hereinbefore mentioned and described, and that such mortgage, when so made and executed, shall constitute, and be and become, a lien upon all said roads and property prior to, and having precedence of, the liens hereinbefore provided for by this instrument.

In witness whereof the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, has caused these presents to be executed and signed by the president of their company, and attested by their secretary, in their behalf and for the said company, and has caused the corporate seal of the company to be hereto affixed, the day and year first above written. And the parties of the second part have hereunto set their hands and affixed their seals the same day and year aforesaid.

[SEAL.] CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON,
President.

[SEAL.] WILLIAM R. FOSDICK,
[SEAL.] JAMES D. FISH,
Trustees.

Attest:
J. S. CAMPBELL, *Secretary.*

78 STATE OF NEW YORK,
City and County of New York, ss:

Before me, the undersigned, a notary public of the State of New York, in the city of New York, duly commissioned and qualified, came this day William D. Judson, to me personally known, and also known by me to be the president of the Chicago, Danville and Vincennes Railroad Company, the party of the first part in the above deed of trust, and who executed the same on behalf of said company, and acknowledged that the said railroad company, and he, as the president of said company, and in its behalf, did sign, seal, and deliver the said indenture and deed o trust, as and for its own act and deed, and for the uses and purposes therein mentioned.

Also personally appeared before me at the same time the above-named William R. Fosdick and James D. Fish, trustees, and the party of the second part in the foregoing mortgage and deed of trust, and personally known to me as the persons who signed the same as such, and acknowledged that they did sign, seal, and execute the same for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this twenty-fifth day of April, anno Domini 1872.

[SEAL.] J. A. WELCH,
Notary Public, New York City and County.

79, 80 *Chicago, Danville & Vincennes Railroad Company. Mortgage to secure convertible mortgage bonds. December* 16, 1872.

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Whereas the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, under and in pursuance of the provisions of the acts incorporating the same, are constructing and operating a railroad in said States, commencing at the city of Chicago and extending southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermilion, in Illinois, to the city of Danville, and also extending from a point on the line above described, distant about twelve miles north of Danville aforesaid, in a southeasterly direction to the boundary-line of the State of Indiana, and thence in said last-named State in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also a branch road extending from the main line before described, commencing at a point on said main line, distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg in said county, and is now engaged in constructing and operating the same.

82 And whereas, at a meeting of the board of directors of the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, held pursuant to law on the fourteenth day of December, in the year one thousand eight hundred and seventy-two, the said board of directors resolved and enacted an order and resolution as follows, to wit:

"Whereas, in consequence of an increase of the traffic of this company's road, it has become necessary to provide the means for the purchase of additional rolling-stock and equipment for the use of the company, and for the improvement of the company's road and property: Therefore,

"Resolved, That an issue of bonds shall be made by the company, designated 'Convertible mortgage bonds,' amounting to one million of dollars, eight hundred of said bonds to be for the sum of $1,000 each, and four hundred of said bonds to be for the sum of $500 each, all of said bonds to bear seven per cent. per annum interest, payable semi annually on the first days of February and August in each year, and the principal to be payable on the first day of February, 1893, and both principal and interest to be payable in United States gold coin in the city of New York; each bond to be convertible into the capital stock of the company at par, at any time before maturity, upon thirty days' written notice to the company, and each bond to contain an express waiver of all recourse by the holder of the same to any individual liability of the stockholders of this company.

"That said bonds shall be dated as made on the first day of January, A. D. 1873.

"In case default be made in the payment of any half year's interest

on any of said bonds, and the warrant for said interest shall have been presented and its payment demanded, and such default shall have continued for six months after such demand, without the consent of
83 the holder of said coupon or bond, then and thereupon the *the* principal of all such bonds shall become immediately due and payable. That a warrant for each semi-annual payment of interest shall be made and authenticated, for and on behalf of this company, by the secretary of this company and annexed to each bond. That said bonds shall be prepared by the president of the company, and signed by him for and on behalf of this company and attested by the treasurer, and shall have annexed to them a certificate of authentication of the trustee or trustees under the mortgage made to secure them, and shall not be issued or obligatory without such certificate.

"That for the purpose of securing the final payment of said issue of $1,000,000 of bonds, with all interest to accrue thereon, this company will make and deliver to James D. Fish and James W. Elwell, as trustees, a mortgage and deed of trust, conveying to such persons as trustees, for the benefit of every holder of such bonds, or any of them, all the road of this company, extending from Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois and Vermilion, to the city of Danville, in said State of Illinois, and also extending from a point on the line above described, situate about twelve miles north of Danville aforesaid, in a southeasterly direction to the boundary-line of the State of Indiana; and thence in said last-named State in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County; and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad. Also a branch road extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg, in said county, and also all such additional branch roads as this company may hereafter construct, for the purpose of extending its tracks into the coal and mining regions in the vicinity of its said
84 main lines of road, with all the property, rights, and franchises of this company, of every kind and description whatever, pertinent to said roads, between all said terminal points, and all the income to be had and derived from operating the same—in trust, to secure the final payment of said bonds as aforesaid—with all the rights, covenants, powers and authority, in case default be made by this company in such payments as in said deed of trust shall be specified, to foreclose said mortgage, and to sell all the property so mortgaged, or to take possession of and operate the same, and receive the incomes thereof; but not, in any case, before any default, to disturb or interfere with this company in the possession, control and management thereof, or from receiving the incomes thereof, or from selling or exchanging any of the personal property, or machinery, or equipments thereof, or any of the lands or real estate, not necessary for the use and operation of the railroad; as to all of which, as will be in said mortgage and deed of trust specifically stated, agreed upon and set forth. That the president of this company is hereby authorized and fully empowered to make and sign, and execute and seal with the corporate seal of this company, the said mortgage and deed of trust, and to acknowledge the same for and on behalf of this company for record; and on the acceptance of said trust, and signing the said deed by the said trustees, to cause the same to be recorded according to law, and thereupon to make, sign, execute

and prepare said $1,000,000 of bonds for issue and sale, as shall be hereafter ordered by this board";

And whereas the said Chicago, Danville and Vincennes Railroad Company, party of the first part, hath, in accordance with the provisions of said order and resolution, made and executed bonds to the amount of one million dollars, of the form, denomination and character prescribed by said order and resolution, and hold the same to be authenticated, issued, used and disposed of for the purposes in said order and resolution stated:

85 Now, therefore, in further pursuance of said order and resolution, and to the end and purpose of securing and assuring the punctual payment of said one million dollars of bonds, and every part thereof, which may be issued to the persons who may become the holders of the same, or any of them, this indenture witnesseth that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the said party of the second part, trustees as aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, doth hereby grant, bargain, sell, enfeoff, release, assign and convey unto the said James D. Fish and James W. Elwell, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire railroad of the party of the first part, lying, being and extending from its terminus, in the city of Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermilion, to the city of Danville, in said State of Illinois, and also extending from a point on the line above described, situate about twelve miles north of Danville aforesaid, in a southeasterly direction to the boundary line of the State of Indiana, and thence in said last-named State in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad. Also, a branch road extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg, in said county, the entire length of road being about two hundred and ten miles; and also all such additional branch roads as said party of the first part may hereafter

86 construct, for the purpose of extending its tracks into the coal and mining regions in the vicinity of said main lines of road; with all its franchises, equipments, property, tolls, issues and profits, and all its lands, tenements, buildings, fixtures, machinery, goods and chattels connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing and erections, and all its rights of way and easements, and all cars, engines and tools, and all rents, reservations and reversions, of every nature and kind whatever, including all the property between all said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever pertinent thereto: Provided, however, that this grant and conveyance aforesaid shall not include nor operate to transfer any lands, goods, chattels, property, machinery, equipment, or other matters which said company now owns, or may hereafter acquire, that need not be used for any purpose incident to the management or operation of said railway, or the repair thereof, or in the business of said railway company; nor any franchises, power or corporate right to build that portion of the line of

railroad which, by its charter, it is authorized to locate and construct, and not embraced within the terminal points hereinbefore described; but all of which last-mentioned franchises and right of way shall be wholly excepted and exempt from these presents, and the grant and conveyance herein specified; nor shall these presents, in any way, prohibit the party of the first part from selling and conveying or otherwise disposing of the same, and all the proceeds thereof; nor from receiving, using and applying any money or personal property of said company to the repairs of said road or its appurtenances, or to its current expenses, or to the purchase of necessary machinery, or the renewal thereof; and the board of directors of said company may likewise distribute and pay any net annual incomes and profits to
87 stockholders, after paying the interest on the said bonds, and providing for any sinking-fund required to be created and kept: To have and to hold the said railway property, premises, interests, rights and appurtenances mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance, unto the said party of the second part, as such trustees as aforesaid, and to their successors in said trust, or assigns, to and for the only use, benefit and behoof of the said trustees and their cestui que trust, their successors and assigns forever: but in special trust and confidence, and upon the conditions following, that is to say:

First. That this conveyance is for, and shall be by the said party of the second part, their successors and assigns, held, used and owned solely for the benefit and protection and security of the persons and corporations who shall hold and own the bonds about to be issued as aforesaid, by the party of the first part, and for enforcing the stipulations of said company as to said issue of bonds, and the disposal thereof, and securing the same, and the final payment thereof, in their true intent and meaning, whether contained in said bonds, or the interest warrants attached to them, or in this deed.

Second. That for the better assuring and confirming the title and powers of the said party of the second part, their successors and assigns, in the said premises and property hereby conveyed, and in and to any premises and property or rights hereafter accruing, or to be acquired by said party of the first part, appurtenant to said railroad, which is intended to pass, or be passed by this conveyance, the said party of the first part, their successors and assigns, will and shall, as often as may be lawfully required by the party of the second part, or their successors or assigns, holding the above granted trust, do such acts, and make such other and further conveyances and assurances in law, as such party of the second part shall, by counsel learned in the law, be
88 advised are necessary for the better carrying out of the object of the parties to this mortgage or deed of trust.

Third. That if the said party of the first part, their successors or assigns, shall well and truly pay to the holders of said one million dollars of bonds, so to be issued and hereby secured, the respective sums of money and interest due and accruing on said bonds on the days and times therein mentioned, and according to the tenor and effect of said bonds, then and thenceforth this indenture, and all the estate hereby granted, shall become and be utterly void and of no further effect: and the same shall be, by such payment, wholly annulled and satisfied, without any further receipt or entry of satisfaction of record whatever, but shall be, if required, entered and certified on any record of the same, as so satisfied, by the party of the second part, or their successors.

Fourth. That until default shall have been made by the party of the

first part in the payment of principal or interest of the said bonds, or some of them, or until default shall have been made in respect to something herein required to be done by the said party of the first part, the said party of the first part shall be suffered and permitted to possess, use, or occupy, manage and operate the said railroad property and franchises, and appurtenances, and to renew, replace, and repair the same, and every part thereof, and take and receive, and use, the tolls, rents, issues, incomes and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

Fifth. In case default shall be made in the payment of any interest on any of the aforesaid bonds issued or to be issued, according to the tenor of the coupons thereto annexed, or of the provisions hereof; or, in case default shall be made in the payment of the principal of said bonds, or any of them, when the same shall become due, without the consent of the holder of such bond on which such default shall occur, the said party of the first part hereby cov-
89 enants and agrees to and with the party of the second part, and their successors and assigns, that within six months after such default shall have occurred, the same default still continuing, the said party of the first part, on demand of the said trustee or trustees for the time being, shall and will surrender to him or them, or to their agent, the actual possession of the herein granted and demised railroad and premises, together with all the books, records, papers, accounts, and money of said company, and all management and control thereof; and that all the expenses of taking, holding, managing, and operating said property, if possession be so taken, shall be paid from the income and profits thereof; and if said property shall, after such taking possession thereof, be sold, then from the sale thereof; or such expenses may be paid from the sale of any personal property, as the said trustees may deem proper; and that said party of the second part, and their successors, having taken such possession, may manage, operate, and control said road and property, and all of its affairs, and appoint all needful agents and employees for that purpose, and pay the same, and receive all the incomes, issues, and profits thereof, and apply the same to the payment of the said interest so in default, according to the true intent and tenor of the said bonds and the coupons annexed, and to the terms of this deed, until such default shall have been satisfied, if such incomes and profits will satisfy the same—first paying all expenses of such possession and management, and all taxes, assessments, and charges on said property, and a just compensation for their own services as such trustees. But in any and all cases of such taking of possession by said party of the second part, and paying up any such default, and the expenses aforesaid, the said party of the second part shall immediately thereafter redeliver the said railway and premises, books, records, and money and accounts, into the possession of the party of the first part: Provided, that no such demand for such posses-
90 sion shall be made by said trustee or trustees, until they shall have been required by the holders of at least the one-half of all of the said issue of bonds which shall then be unpaid and outstanding, to make such demand, and to take such possession of said road and property.

Sixth. That in case default shall be made as aforesaid, and shall continue as aforesaid, it shall be lawful for the party of the second part, or their successors in said trust, after entry as aforesaid, or other entry, or without entry, personally, or by agent or attorney, to sell and dispose of, to the highest bidder, all and singular the premises hereby conveyed,

or intended so to be, at public auction, in the city of Chicago, in the State of Illinois, or in the city of Indianapolis, in the State of Indiana, at such time as said party of the second part may appoint, first having demanded of the party of the first part full payment of all money then in default; and also first having given sixty days' notice of such time and place of sale, and a full description of the property so to be sold, by advertisement thereof in three newspapers: one published in Chicago, in the State of Illinois, one published in Indianapolis, in the State of Indiana, and one published in the city of New York; and to adjourn said sale from time to time, in their discretion, and, if adjourned, to make such sale in manner aforesaid, without further notice, at the time and place to which it may be adjourned; and upon such sale, and receiving the purchase-money therefor, to convey the same, by good and sufficient conveyances, to the purchaser or purchasers; and such sale and conveyance so made shall convey all the right, title, estate, interest, and property of the said party of the first part of, in, and to the said road, premises, franchises, and property, to the said purchaser, in fee-simple, forever; and shall be a perpetual bar, both in law and equity, against the said party of the first part, and their successors and assigns, and against all and every person claiming
91 or to claim the said premises, or any part thereof, unto them forever. After deducting from the proceeds of such sale the expenses of the sale and conveyance, and all advances or liabilities which may have been made or incurred by the party of the second part in operating and controlling and maintaining the said railroad and property, and in managing its business and affairs while in possession, and all payments for taxes, charges, and assessments on said premises, or any part thereof, as well as reasonable compensation for their own services, to apply the proceeds of such sale to the payment of the interest on said bonds, or so many of them as shall have been issued by said party of the first part, and be then outstanding, pro rata, until all such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds, pro rata, until such principal shall be paid; and if any surplus remain after paying all of said matters, to pay such surplus to the party of the first part; and such payments shall be so made on said bonds, whether the same shall have become due or not at the time of such sale.

It is hereby declared that the receipt of said trustee or trustees, making any such sale, to the purchaser of the premises, for the purchase-money shall be a full and sufficient discharge of such purchaser therefor, and that said purchaser shall not, after payment of said purchase-money, and obtaining such receipt therefor, be liable or in any way bound to see said purchase-money applied to this trust, or otherwise, or in any manner answerable for its loss or misapplication, or obliged to inquire into the authority for making such sale.

Seventh. At any sale of the property aforesaid, or any part thereof, made by virtue of these presents, or by judicial authority, the said trustee or trustees may bid for and purchase, or cause to be purchased, the property so sold, or any part of it, in behalf of the holders of said bonds secured by this deed then outstanding, at a reasonable price, if
92 only a part be sold; but if the whole property be sold, at a price not exceeding the whole amount of said bonds and interest then outstanding.

Eighth. If default be made by the party of the first part in the payment of any half-year's interest on any of said bonds, and the warrant or coupon for such interest shall have been presented, and its payment

demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as herein provided.

Ninth. It is hereby mutually agreed by the parties hereto that the trustees shall be responsible only for gross negligence and willful default, and that they shall not be bound to do any act touching the execution of the trust, except at their own option, which may involve them in personal expense or liability, unless first duly and satisfactorily indemnified against the same by one or more of said bondholders.

In case of the death, resignation, or inability to act of any trustee, the board of directors may appoint a successor, and failing to so appoint, any court of competent jurisdiction may appoint a trustee to fill such vacancy, on the application of the holders of the one-sixth part of the bonds hereby intended to be secured, then outstanding, and such appointment by the board or by such court shall invest the trustees so appointed with all the interest, estate, power, and authority in the premises, and subject him or them to the same obligations hereby given and granted to the party of the second part herein.

93 In witness whereof the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, has caused these presents to be executed and signed by the president of their company, and attested by their secretary, in their behalf and for the said company, and has caused the corporate seal of the company to be hereto affixed, the day and year first above written. And the parties of the second part have hereunto set their hands and affixed their seals the same day and year aforesaid.

CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
[SEAL.] By W. D. JUDSON,
President.

J. S. CAMPBELL, *Secretary.*
[SEAL.] JAMES D. FISH,
[SEAL.] JA'S W. ELWELL,
Trustees.

Executed in presence of—
H. A. GILDERSLEEVE.
R. N. WHITLOCK.

STATE OF NEW YORK,
City and County of New York, ss:

Before me, the undersigned, a notary public of the State of New York, in the city of New York, duly commissioned and qualified, came this day William D. Judson, to me personally known, and also known by me to be the president of the Chicago, Danville and Vincennes Railroad Company, the party of the first part in the above deed of trust, and who executed the same on behalf of said company, and acknowledged that the said railroad company, and he, as the president of the said company, and in its behalf, did sign, seal, and deliver the said indenture and deed of trust, as and for its own act and deed, and for the uses and purposes therein mentioned.

Also personally appeared before me at the same time the above-
94 named James D. Fish and James W. Elwell, trustees, and the party of the second part in the foregoing mortgage and deed of trust, and both personally known to me as the persons who signed the same as such, and each acknowledged that they did sign, seal, and execute the same, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this nineteenth day of December, anno Domini 1872.

[SEAL.] H. A. GILDERSLEEVE,
Notary Public, New York City and County.

95 *Chicago, Danville & Vincennes Railroad Company to R. Biddle Roberts, Trustee.*

CHATTEL MORTGAGE.

96 This indenture, made the twelfth day of January, A. D. one thousand eight hundred and seventy-five, between the Chicago, Danville and Vincennes Railroad Company, a corporation existing under the laws of the States of Illinois and Indiana, party of the first part, and R. Biddle Roberts, of the city of Chicago, and State of Illinois, trustee, upon certain trusts hereinafter specified and provided, the party of the second part, witnesseth as follows:

That the party of the first part, in order to pay off and discharge certain debts and obligations incurred in the construction, equipment, and operating of said railroad, and to enable them to conduct, operate, and continue the business of said company, and also in pursuance of the resolutions of said company passed the second day of January, A. D. 1875, a copy of which resolutions is hereto annexed, marked "A," and forming part of this indenture, have made and issued their several bonds or obligations, all having even date herewith, and which are numbered and are of the several denominations following, to wit: Nine hundred and fifteen bonds of one thousand dollars each, numbered from number 1 to 915, both inclusive; one hundred bonds of five hundred dollars each, numbered from number 916 to 1015, both inclusive; one hundred bonds of two hundred and fifty dollars each, numbered from 1016 to 1115, both inclusive; and one hundred bonds of one hundred dollars each, numbered from 1116 to 1215, both inclusive, and each of said bonds being made payable to said party of the second part or bearer, at the said company's office in the city of Chicago, on the twelfth day of January, A. D. 1877, with interest thereon at the rate of seven per cent. per annum from the date thereof.

97 Now, this indenture witnesseth that the party of the first part, in order to secure the payment of the said several bonds hereinbefore mentioned, as they respectively fall due, in the hands of bona fide holders thereof, and the interest thereon, and in consideration of the sum of one dollar, to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, released, conveyed, and confirmed, and by these presents do grant, bargain and sell, assign, release, convey and confirm, transfer and set over, unto the said party of the second part, trustee, as aforesaid, and his successors or assigns, all the locomotives, passenger-cars, baggage-cars, freight cars, shop-tools, and all other machinery and personal property now owned by or in the possession of the said party of the first part, and more particularly named and described in the schedule hereto annexed, marked "B," and which said

schedule forms a part of this indenture, subject, however, to such prior liens as there may be upon the same, or upon any portion thereof, if any such prior liens exist.

To have and to hold the same, to the said party of the second part, or to his successors or assigns, forever; and it is hereby further mutually declared, granted, and agreed by the said company, party of the first part, and said party of the second part, trustee, representing the rights and interests in the securities of the parties taking or holding the said bonds and obligations, in the form and manner following, viz: That if the said party of the first part shall well and faithfully pay the said principal sum of said bonds, on the day when the same are made payable by this indenture, as above-mentioned, according to the true intent and meaning thereof, with the interest due thereon, or shall deliver up, cancelled, to the said party of the second part, all of the said bonds mentioned herein, then these presents shall cease and determine;

98 that until default shall have been made by the party of the first part, in the payment of the principal or interest of the said bonds, or some of them, or until default shall have been made in respect to something herein required to be done by the said party of the first part, the said party of the first part shall be suffered and permitted to possess, use, occupy, manage, and operate all of the chattels and property mentioned herein, and to renew and repair the same and every part thereof, and take and receive and use the tolls, rents, issues, incomes, and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

But if default shall be made by the party of the first part in the payment of said bonds or obligations, at the time they shall fall due, according to the true intent and meaning thereof, then it shall be lawful for the said party of the second part, or his successors or assigns, and it shall be his or their duty, and they are hereby authorized and empowered, either in person or by attorney, or by his agents, to take possession of the said chattels, and all other articles mentioned in the said annexed schedule, and to sell or dispose of the same, or any part thereof, at public auction, at the best price he can obtain for the same, according to the statute in such cases made and provided, and out of the proceeds arising from such sale to defray the expenses of such sale, and his own just and lawful charges, and then pay over the proceeds to and amongst the parties holding the said bonds or obligations, so far as may be necessary to pay the amount then due and in arrears upon the same, and the balance of the proceeds, if any there be, to be paid over to the said parties of the first part, or their assigns.

In witness whereof the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, has caused these presents to be executed and signed by the president of their company, in their behalf and for the said company, and has caused the corporate seal of

99 the company to be hereto affixed the day and year first above written, and the party of the second part has hereunto set his hand and affixed his seal the same day and year aforesaid.

[SEAL OF CO.] CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,

(Signed) By W. D. JUDSON,
President.

(Signed) [SEAL.] R. BIDDLE ROBERTS,
Trustee.

STATE OF ILLINOIS,
County of Cook, ss:

This chattel mortgage was acknowledged before me by W. D. Judson, president of the Chicago, Danville and Vincennes Railroad Company, and R. Biddle Roberts, the said trustee, and entered by me this thirteenth day of January, A. D. 1875.

(Signed) J. CHARLES HAINES,
Justice of the Peace.

EXHIBIT A.

Resolved, That an issue of bonds shall be made by the company, amounting in the aggregate to a sum not exceeding one million of dollars, in such denominations as the officers of the company may deem advisable, payable in not exceeding two years from date of issue, either with or without interest, and that the said bonds be secured by
100 a chattel mortgage to a trustee or trustees, upon all the locomotives, passenger cars, baggage and freight cars, and all other machinery and shop tools and other personal property, now owned by or in possession of the company, subject to such prior liens as there may be upon the same in favor of the bondholders of the company, or any other parties, if any such prior liens exist, and that the president of company be and he hereby is authorized, directed, and fully empowered to make and sign, and execute and seal, with the corporate seal of the company, the said chattel mortgage or deed of trust, and to acknowledge the same for and on behalf of this company for record, and on the acceptance of said trust by the said trustee or trustees, to cause the same to be recorded, according to law, and thereupon to make, sign, execute, and prepare the said bonds for issue, and to use and dispose of the said bonds to settle and pay, or to secure, any portion of the indebtedness of this company.

EXHIBIT B.

Thirty-four (34) locomotive engines, numbered from No. 1 to 34, both inclusive.

Three hundred and seventy-six (376) gondola coal-cars, numbered from No. 1 to 376, both inclusive.

One hundred and fifteen (115) stock cars, numbered from No. 501 to 615, both inclusive.

One hundred and fifteen (115) box-cars, numbered from No. 1001 to 1115, both inclusive.

Two hundred and twenty-five (225) gondola coal-cars, numbered from No. 0141 to 0365, both inclusive.

Six (6) caboose cars, numbered from No. 1 to 6, both inclusive.

Four (4) baggage-cars, numbered from No. 1 to 4, both inclusive.

Three (3) mail and passenger cars, numbered from No. 1 to 3, both inclusive.

Eight (8) passenger-coaches, numbered from 1 to 8, both inclusive.

101–105 The following machinery and tools in the machine-shops at Danville, Vermilion County, Illinois:

1 44-inch iron-planer.
1 30-inch iron-planer.
2 14-inch shaping-machines.
1 slotting-machine.

1 lathe, 34-inch swing.
1 lathe, 16-inch swing.
1 lathe, 20 inch swing.
1 lathe, 25-inch swing.
1 axle centering lathe.
1 hydraulic wheel-press.
1 driving-wheel lathe.
1 car-wheel borer.
1 boilermaker's shears.
1 boilermaker's punch.
1 hydraulic crank pin press.
1 steam-hammer.
1 bolt-cutter.
1 small emery grinder.
1 axle-lathe.
1 drilling-press.
1 drilling press.
1 stationary steam engine.

(Endorsed:) Filed Feb'y 22, 1875. Conrad Tatge, clerk.

106 And afterwards, to wit, on the 22d day of February, A. D. 1875, the same being one of the regular days of the January term of said court for the year last aforesaid, and the court being then duly organized and sitting in open court, certain proceedings were had and entered of record therein, in the words and figures following, to wit:

STATE OF ILLINOIS:

Will circuit court, January term, 1875.

STEPHEN OSGOOD
ag'st
THE CHICAGO, DANVILLE AND VINCENNES RAILroad Company, and others.

Now, on this 22d day of February, 1875, comes the complainant, by his solicitor, and moves the court, upon the bill and papers therewith filed, for a temporary injunction and a receiver, in accordance with the prayer of said bill, and on consideration of the said bill of complaint and exhibits, and the affidavits and papers filed and produced in support of the said motion, it appears to the satisfaction of the court, the conditions of mortgages of 1869 and 1872, executed by said defendant corporation, mentioned in the bill, have been broken, and the corporate estate forfeited, that the said mortgaged property is an entirely inadequate security for the amount of bonded debt charged against it,
107 and that the pledged tolls and incomes of the said mortgaged property are not sufficient for, nor are the same being applied toward the payment of the interest on such mortgage debt, and it further appears to the court that the said Chicago, Danville and Vincennes Railroad Company is utterly insolvent and unable to pay its debts in the usual course of business, and that judgments have been rendered against it and suffered to remain unpaid for more than twelve months, notwithstanding executions were not stayed, by appeal or supersedeas, whereby, under the statute of the State of Indiana, the corporate franchises in such have become forfeited, and the corporate affairs are required by

such statute to be wound up according to law, and it further appearing to the court, from such complaint and papers, that very many suits are pending and recoveries threatened against said corporation, and that there are other reasons which make the appointment of a receiver necessary and proper in order to secure the just priorities and liens of the said bond creditors, and procure a faithful administration of the corporate affairs for the benefit of its creditors, it is therefore ordered that said motion of the complainant be sustained, and that Henry B. Hammond and John B. Brown be, and they are hereby appointed, receivers of the said Chicago, Danville and Vincennes Railroad Company, in the State of Illinois, and all its books, papers, records, vouchers, railroad real estate, personal property, money, choses in action, rights, credits, and effects, and assets of every character and description, wherever situate, to have and to hold the same, as receivers under the order, and as the officers of this court.

And the said receivers are required to take oath and file an undertaking in the penal sum of one hundred and fifty thousand dollars,
108 and conditioned according to law, faithfully to discharge their duties as receivers, and in all things obey the orders of the court, and the proposed sureties on said undertaking, Winslow Bushnell, Francis E. Hinckley, John A. Brown, Joel V. Taylor, and William Ripley, are hereby approved by the court.

And the said receivers upon taking such oath, and filing such undertaking, are fully authorized and required by the court to immediately take into their exclusive possession, custody, management, and control, as the officers of this court, and the same to hold and operate, until discharged, by the further order of the court in this action, the following property, that is to say, all and singular the line of railroad constructed or being constructed of the said Chicago, Danville and Vincennes Railroad Company, wherever situate, in the State of Illinois, in counties of Cook, Will, Kankakee, Iroquois, and Vermillion, together with the right of way, and land occupied thereby, the superstructure and the tracks thereupon, depot-grounds, and buildings, machine-shops, water-tanks, wood-sheds, bridges, culverts, fences, switches, iron, engines, cars, machinery, coal, wood, and tools, furniture, stationery, office supplies, and materials of all and every kind whatsoever, affixed or appertenant to the said line of railroad aforesaid, and the rights, privileges, and franchises; to operate, maintain, and control the same under the original charter of the said railroad company, and the several amendments thereto, and the laws of Illinois in that behalf.

And the said receivers are further empowered, authorized, and required to immediately take into their possession all and singular the real and personal property and leasehold estates of all and every kind,
109 character, and description whatsoever, whether held in possession or remainder not embraced in the description of said line of railway, and its appurtenances, and all and singular the money, notes, unissued bonds, accounts, contracts, papers, vouchers, and choses in action to which the said railroad company is in any way entitled in law or in equity, and the said receivers are also required and authorized to immediately take into their possession and control all and singular the books of record and account of every kind, and all papers, contracts, deeds, and vouchers belonging to the said railroad company and used for the purpose of stating or preserving the business of said corporation, all and singular of which property, books, papers, moneys, bonds, credits, and franchises are to be held by the said receivers pending this litigation, who shall respecting the said property, credits, and franchises

obey such orders and directions as they may from time to time receive from this court in relation to their said trust, and shall further account for and pay or deliver over as they may be thereto directed by the court all the moneys, property, and effects of the company which shall come into their hands as such receivers.

And the said Chicago, Danville & Vincennes Railroad Company, and all and every of her officers, agents or employés, including her president, directors, secretary, superintendent, agents, engineers, conductors, or other servants, shall each and every of them forthwith upon the request and demands of the receivers, or their agents or attorneys, disclose and immediately deliver over to the said receivers all and every part of the property of the said company or its choses in action, in their possession, or within their power, or under their control, or in the possession, within the power, or under the control of either of them.

110 And the Chicago, Danville & Vincennes Railway Company by its proper officers are hereby directed and required to execute and deliver to the receivers upon demand a properly executed assignment in writing, transferring to and vesting in the said receivers, all right, title, and estate of the said railroad company in and to all the property, books, rights, credits, and effects of said corporation and every part thereof.

And it is further ordered that in case the said railroad company, or any of her officers, attorneys, agents, or employés, shall, notwithstanding this order and the demand of the said receivers, or their agents or attorneys, refuse or neglect to execute such assignment, or to deliver up the possession and control of any part of the property, books, papers, or effects of the said railroad company as may be in his or their possession or control, which are hereby required to be delivered over to such receivers, thereupon an affidavit of the said receivers, or their agents or attorneys, being filed in this cause with the clerk, disclosing such facts, and the name of the person or persons so refusing to deliver up possession of the property of said railroad company, the clerk of this court shall instanter issue an attachment under the seal of this court, against such person or persons, directed to the sheriff of any county wherein said railroad extends, or where such person or persons so disobeying the order of this court may be found, and returnable to the next term of this court, bailable in the sum of five thousand dollars, to answer to this court for a contempt. And the said receivers are further empowered, in case they deem it expedient, to install them in quiet possession of all and singular the trust property hereby committed to their charge, to sue out of this court upon their due

111 qualification, a writ of assistance, signed by the clerk, and sealed with the seal of this court, and directed to the sheriff or coroner of any county or counties of this State wherein any of said corporate property is situate, or may be found, commanding such officer to forthwith install, and put the said receivers into the full and exclusive possession of such part of the property of the said railroad company as may be situate in such county.

And the Chicago, Danville and Vincennes Railroad Company, and all its officers, agents, attorneys, trustees, or employees, are hereby strictly enjoined from in any manner transferring, assigning, encumbering, or secreting any property of said corporation in their possession or under their control or in the possession or under the control of either of them, and especially from transferring, negotiating, secreting, or retaining certain so-called chattel-mortgage bonds, dated January 12th, 1875, as to all which said bonds or any other unissued bonds, now

in their custody, or in any manner under their control, they and each of them are hereby required to forthwith disclose and deliver them over to the receivers or their agents duly authorized.

And it is further ordered, that until the further order and direction of this court in the premises, the said Henry B. Hammond and John B. Brown, as such receivers as aforesaid, shall be, and they are hereby authorized and empowered to have and to hold all and singular the real and personal and mixed property of the said railroad company, and all the rights, credits, and franchises in which it has any interest whatever, together with all its books, papers, vouche's, and records, free and clear from the claim, occupancy, interference or interposition
112 of any officer of said corporation or any other person whatsoever, and to maintain, operate, and control the said line of railroad under and according to the charter of said corporation and the laws of Illinois, and to receive all and singular, the rents, tolls, and income, which may accrue from the operation of the said line of railroad, and to that end, and for the purpose of carrying on the usual business of said line of railroad in receiving and transporting passengers, freight, express goods, and mails of the United States, the said Henry B. Hammond and John B. Brown, as such receivers as aforesaid, shall have the power and authority to appoint and employ any and all such clerks, agents, superintendents, attorneys, conductors, engineers, and other employees, as in their judgment may be necessary and expedient to protect said trust estate, and for the convenient and proper management of said property intrusted to them, and the due and legal execution of their said trust, and to stipulate with each and every of such attorneys, agents, clerks, superintendents, conductors, engineers, and other employees for the payment to them severally out of the funds which may be paid into their hands, as receivers, of such reasonable compensation as may be agreed upon by said receivers and their said attorney, agent, or employee.

And the said Henry B. Hammond and John B. Brown, as such receivers as aforesaid, shall, in the discharge of their said trust, have the authority to give to any such attorney, agent, or employee an appointment in, writing, specifying the duties and powers of the said agent or employee the length of his term of services under such receivers, and the compensation agreed upon.

And the said receivers shall have full right and authority to accept from any such agent or employee a bond, signed by such agent or employee, with such securities as may be satisfactory to such receiv-
113 ers, conditioned that such agent or employee will faithfully perform his duties as such agent, and fully account for and pay or deliver over to the receivers all money or property which may come into his hands as such agent or employee. And the said receivers shall have full authority at any time, and summarily, to discontinue the service of or discharge any or all the superintendents, attorneys, agents, or employees by them appointed, and to select and appoint others in their stead.

And the said receivers shall have the full power and authority by such agents and employees, and in such manner as may by them be deemed most advantageous to the trust estate, to use and employ the said line of railroad, and the engines, cars, machinery, and property connected therewith, and all the appurtenances thereof, in as full and complete a manner, in every respect, as the said railroad company, under her said charter and the laws of Illinois, had the power and authority to do, and to that end the said receiver shall have the power to make

contracts for the transportation of passengers and freight, express goods and mails, and to fix the rates for the carriage of the same, and to make running arrangements with such other railroads as connect with the said Chicago, Danville and Vincennes Railroad Company, and as the said last-named company have been in the habit of having running arrangements with, as in the judgment of said receivers may be most advantageous and profitable for the interest of the property herewith entrusted to them.

And after the taking possession of said property of the said railroad corporation, the said receivers shall have the exclusive power and authority, by themselves and their duly constituted agents, to manage, hold, and enjoy the said property, books, records, and papers, and
114 each and every part thereof, and to receive, receipt for, and hold under the order of the court all and singular the tolls, rents, and income that may hereafter accrue by reason of the operation of said railroad, and all the moneys that may be paid into their hands as receivers, in consequence of any debts now due and owing to the said railroad company, or that they may receive by reason of the sale of any property of said company hereafter ordered by the court to be sold.

And the said receivers are further authorized to proceed by suit or otherwise, and in such manner and at such times as they may deem most expedient, to collect all and singular the notes, accounts, credits, and choses in action of every kind which may now be justly due and owing to the said railroad company, and also to prosecute all suits now pending in behalf of said company, and if the said receivers shall, in any case, deem it expedient to effect a compromise with any debtor of the said corporation, they shall have full power so to do, reporting their action to the court for its confirmation.

And out of the moneys which may come into the hands of such receivers by reason of the operation of the said railroad, the collection of debts or the sale of property, the said receivers are hereby fully authorized, without any special or further order of the court, as to the particular demand, to pay and satisfy the following classes of claims and expenses:

First. The necessary current expenses of carrying out the duties of their trusts, and managing the said railroad, including wages of all the operatives, agents, attorneys, and officers employed by the said receivers, in operating the said line of railroad, or in and about the execution of their trust, the purchase money for all such engines, cars, ties, iron, machinery, tools and materials which are necessary, in the judg-
115 ment of the receivers, for the convenient and proper managment of said road, all of which necessary expenses, supplies, and repairs and renewals the said receivers are specially authorized hereby to contract for and purchase, to the end that said railroad may be kept in an efficient shape.

Second. All debts now due and owing by the said railroad company, for labor and services rendered, in operating the said railroad, within the last three months, and all indebtedness for the engines, iron, wood, supplies, cars, or other property purchased within said period of three months, for the use of the company.

Third. All the legal taxes and assessments, of any kind, county, township, State, and Federal, which may be now existing against the property of the said railroad company, or which may hereafter be assessed or levied upon the same, or may arise by virtue of the receipts and business of said company; all premiums for insurance on the depots, buildings, and machinery of said company, and all other legal costs,

charges, and expenses which may arise out of litigation, begun or defended by the said receivers, in the proper discharge of the discretion hereby vested in them.

Fourth. All liabilities now due from said railroad company or which may hereafter be, from time to time, incurred, by reason of animals killed by the engines or cars, upon the line of said road, and the said receivers are hereby authorized to settle and compromise any and all such claims, upon such terms as they may deem most expedient.

And the said receivers are further authorized to appear in and defend, under their own exclusive management, all suits which may be
116 pending at the date of their appointment against the said Chicago, Danville and Vincennes Railroad Company in any court in the State of Illinois or elsewhere, or for any cause whatsoever, in all respects as fully as the said corporation itself could appear and defend.

And the said receivers are further empowered, without further order, to institute, either in their own or the name of the corporation, all such suits and proceedings in court of proper jurisdiction as may be by them thought necessary or proper, in order to collect assets, or in any way preserve and defend the property and trusts committed to their possession and management.

And the Chicago, Danville and Vincennes Railroad Company, and each and every of its officers, agents, attorneys, directors, and employees, are hereby restrained and enjoined from interfering in any manner with the property, books, papers, accounts, and other assets of the said railroad corporation, and are hereby further enjoined from disturbing, or attempting in any manner to disturb, the possession or management of such property, or any part thereof, by the receivers of this court, and are still further restrained from interfering in any manner in the conduct of the prosecution or defense of any suit, action, or legal proceeding now pending, or hereafter to be brought by or against the said Chicago, Danville and Vincennes Railroad Company.

And the said receivers are hereby instructed to open and keep proper books of account, showing the operations of their trust, and at each regular term of this court, succeeding to the present, shall present and file in this court their accounts current, stating the receipts by them as receivers, and the payments by them made, and as to the said receivers, this action is continued with liberty for them to apply to this
117 court by petition, at any time, for such further instructions in relation to their said trust as they may from time to time desire. And now, in open court, the said receivers take an oath to faithfully perform their duties as such receivers, and also file their bond with surities, which said bond is approved by the court.

117½ (Indorsed:) Will circuit court of Illinois. Fountain circuit court of Indiana. Stephen Osgood vs. The Chicago, Danville and Vincennes R. R. Co. Copy of complaint and order appointing receivers.

118 Afterwards, to wit, on the 27th day of March, A. D. 1875, said complainant, by his solicitor, filed in said clerk's office a motion to strike from the files of said court the papers in said entitled cause, which said motion is in the words and figures following, to wit:

Motion to strike papers from the files.

Will County circuit court.

STEPHEN OSGOOD *v.* THE CHICAGO, DANVILLE AND VINCENNES Railroad Company, William R. Fosdick, James D. Fish, R. Biddle Roberts, William D. Judson, Amos Tenney, James W. Elwell, James J. Shyrock, The Bank of North America, William Hesse, Michael Kelly, George W. Stow, Henry Meineke, Philo Carpenter, International Bank of Chicago, Andrew Crawford, Cornelius R. Field, George S. King, and Bezaleel W. Phillips, composing the firm of Field, King and Company.	Bill for injunction and receiver and cross-bill.

STATE OF ILLINOIS,
Will County, ss:

119 Henry R. Pohl, being first duly sworn, upon his oath says that he is the deputy clerk of the circuit court of Cook County, duly appointed and qualified and acting as such; that the said circuit court of Will County adjourned on the sixth day of March, A. D. 1875, until its next term in course; and that the petitions of William R. Fosdick and James D. Fish, and of the Chicago, Danville and Vincennes Railroad Company, William D. Judson, Amos Tenney, and R. Biddle Roberts, filed on the 22nd day of March, A. D. 1875, in a cause pending in said circuit court, wherein Stephen Osgood is complainant and the Chicago, Danville and Vincennes Railroad Company, William R. Fosdick, James D. Fish, R. Biddle Roberts, William D. Judson, Amos Tenney, James W. Elwell, and others (being cause No. 6557 of said court), for the removal of said suit into the United States circuit court for the northern district of Illinois, have never been presented to the judge of said court, nor have the two bonds filed in connection with said petitions on the day last aforesaid ever been approved by said judge.

HENRY R. POHL.

Subscribed and sworn to before me this 26th day of March, A. D. 1875.
[SEAL [
W. B. HAWLEY,
Co. Clerk of Will County, Illinois.

120 Circuit court of the U. S., northern district of Illinois.

In the matter of certain papers filed in this court, purporting to be a removal from the Will circuit court of the cause therein pending of—

STEPHEN OSGOOD AND OTHERS *against* THE CHICAGO, DANVILLE AND VINCENNES Railroad Company and others.	

Stephen Osgood, wholly denying the jurisdiction of this court in the said matter, moves this court to strike said cause from its docket, and strikes all papers pertaining thereto from its files, because—

1. Said suit in said Will circuit court was not removable to this court under any act of Congress.

2. Said suit has not been removed from said Will circuit court in accordance with any act of Congress.

3. This court has no jurisdiction in said cause.

STEPHEN OSGOOD,
By H. CRAWFORD, *Solicitor.*

(Endorsed:) Filed March 27, 1875. W'm H. Bradley, cl'k.

121 Afterwards, to wit, on the fifth day of May, A. D. 1875, there was filed in said clerk's office a certified copy of the order entered of record in said circuit court of Will County on the third day of May, A. D. 1875, in said-entitled cause, which said certified copy is in the words and figures following, to wit:

Certified copy of order of circuit court of Will County.

Circuit court of Will County.

STEPHEN OSGOOD
ag'st
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company and others. } Bill.

BANK OF NORTH AMERICA
ag'st
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company and others. } Cross bill.

Come now the parties before the Hon. Josiah McRoberts, judge of the said court at chambers, the complainant, by Henry Crawford, his solicitor; the Chicago, Danville and Vincennes Railroad Company, James W. Elwell, William D. Judson, Amos Tenney, and R Biddle Roberts, by E. Walker, their solicitor; William R. Fosdick and
122 James D. Fish, by G. C. Campbell, their solicitor, and the Bank of North America, Andrew Crawford, the International Bank of Chicago, Cornelius R. Field, George S. King, and Bezaleel W. Phillips, by Cooper Garnett and Packard and John Van Arman, their solicitors, in pursuance of notice served upon the solicitors of said railroad company, Elwell, Tenny, Judson, Roberts, Fosdick, and Fish, and said complainant Osgood, by said Bank of North America and the other defendants.

And the said William R. Fosdick and James D. Fish, by their solicitor G. C. Campbell, present unto the court their certain application filed March 22, 1875, for a removal of this suit into the circuit court of the United States, together with the bond accompanying the said application, and do ask the court to accept the said petition and bond. The said complainant and the defendants, the Bank of North America, Andrew Crawford, the International Bank of Chicago, Cornelius R. Field, George S. King, and Bezaleel W. Phillips object to the acceptance of said petition and bond, and the court then and there refused to accept the same, because the said petition is not verified by affidavit nor the facts therein stated otherwise proven, and because the facts
123 alleged in the said petition, are, in the judgment of the court, legally insufficient to warrant the removal.

And the defendant, The Chicago, Danville and Vincennes Railroad Company, William D. Judson, Amos Tenny, and R. Biddle Roberts, by E. Walker, their solicitor, present unto the court their certain applica

tion, filed March 22, 1875, praying for a removal of this suit into the circuit court of the United States, together with the bond accompanying their said application, and do ask the court to accept the said petition and bond. The said complainant and the defendants the Bank of North America, Andrew Crawford, the International Bank of Chicago, Cornelius R. Field, George S. King, and B. W. Phillips object to the acceptance of said petition and bond, and the court then and there refused to accept the same because said petition is not verified by affidavit, nor the facts therein stated otherwise proven, and because the facts alleged in the said petition are, in the judgment of the court, legally insufficient to warrant the removal.

And therefore the defendant, James W. Elwell, by E. Walker, his solicitor, presents to this court an application, filed April 19, 1875,
124 praying a removal of this suit unto the United States courts, together with the bond accompanying said application; and the said Elwell asks the court to accept said petition and bond, and the hearing of set for hearing on to-morrow morning, and after argument of respective counsel the court takes the matter under advisement on the 3rd of May then next.

And now, on this 3d of May, A. D. 1875, come the parties, and the court does accept the said petition of the said Elwell, and the bond filed therewith, and orders that this suit be removed to the circuit court of the United States for the northern district of Illinois, according to the prayer of said petitioner.

(Signed) J. McROBERTS,
Judge, &c.

The clerk will file and enter the above order of record.

(Signed) J. McROBERTS,
Judge, &c.

STATE OF ILLINOIS,
Will County, ss:

I, Conrad Tatge, clerk of the circuit court of said county, and keeper of the records and files of said court, do hereby certify that the above and foregoing is a full, true, and perfect copy of the order of said court in the above-entitled cause, made and entered of record on May
125 3d, 1875, as the same appears from the records and files of said court now remaining in my said office.

In attestation whereof I have hereunto subscribed my name and affixed the seal of said court at office in Joliet, in said county, this 4th day of May, A. D. 1875.

[SEAL.] CONRAD TATGE, *Clerk.*

(Endorsed:) Filed May 5, 1875. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 17th day of May, A. D. 1875, the receivers of said railroad filed in said clerk's office their report in said entitled cause, which said report is in the words and figures following, to wit:

Report of receiver.

Circuit court of the United States, northern district of Illinois.

STEPHEN OSGOOD
against
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company and others.

The receivers of The Chicago, Danville and Vincennes Rail
126 road Company respectfully report that their earnings during the month of February, from the 22d to the close of the month, were

$13,909.90 as against $11,955.95 for the corresponding period of last year, and their expenses were $9,053.77 as against $8,285.26 for the like period during the year 1874.

That during the month of March, 1875, their earnings were $62,746.11 as against $52,903.01 for March, 1874, and their expenses were $49,983.33, including therein extraordinary expenses as follows, which were not incurred during March, 1874:

Interest paid P. C. and S't L. Railway, pass.	593 97
do freight	2,969 86
Rent of depot grounds	867 16
Insurance	140 00
Repairs bridges	426 46
Iron rails	5,083 00
Spikes	38 75
Splices and bolts	316 64
Watchmen	235 00
Track laying	1,321 96
Increase in expenses by reason of increased working time	412 04

Their earnings during the month of April were $66,935.10 against $48,353.02 in April, 1874.

Their expenses during the month were $53,427.29, including therein extraordinary expenditures as follows:

127	Interest paid P. C. and S't L. R., pass	$597 87
	do freight	2,989 36
	Repairs bridges	409 46
	New cross-ties	1,621 63
	Frogs	266 56
	Iron rails	6,243 21
	Spikes	168 72
	Splices and bolts	259 92
	Turntable	1,000
	Wheelbarrows, tools, &c	400
	Construction train	1,518 52
	Track laying, &c	1,074 30
	Total extraordinary exp's	$16,549 55

During the month of February, 1875, after their appointment, the receipts of the receivers were	$4,459 63
And their payments were	389 05
Leaving balance over for the month of	4,170 58
During the month of March, 1875, the receipts were	$42,980 65
And their disbursements were	36,162 95
Leaving a balance over for the month of	$10,988
During the month of April, 1875, the receipts were	$56,960 53
And their disbursements were	54,173 58
Leaving a balance over for the month of	$13,774 95

J. B. BROWN.
H. B. HAMMOND.

128 STATE OF ILLINOIS,
Cook County, ss:

John B. Brown, on oath, says that he is one of the receivers of the Chicago, Danville and Vincennes Railroad Company, and that the foregoing report by him subscribed is true, as he verily believes.

JOHN B. BROWN.

Subscribed and sworn to before me this 17th May, 1875.
[SEAL.] GIDEON L. BARBER,
Notary Public.

(Endorsed:) Filed May 17, '75. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 11th day of June, A. D. 1875, Henry B. Hammond, one of the said receivers, filed in said clerk's office his supplemental report in said entitled cause, which said supplemental report is in the words and figures following, to wit:

Supplemental report of H. B. Hammond, receiver.

In the circuit court of the United States for the northern district of Illinois.

STEPHEN OSGOOD
vs.
129 THE CHICAGO, DANVILLE AND VINCENNES Railroad Company. } In chancery.

In the matter of the receivers.

Henry B. Hammond, one of the receivers of the Chicago, Danville and Vincennes Railroad Company, makes the following as an additional and supplemental report in this behalf:

That upon the appointment of the undersigned and the said John B. Brown as receivers of said company, as set forth in the report of the said Brown, to which this is supplemental, the said Brown took the active control and management of the property of said company, and of the receipts and disbursements of all the funds received and realized in the management of said trust, as fully shown and set forth in the said report of the said Brown. That the undersigned has examined said report, and upon his knowledge and belief affirms the same to be correct.

That *the* addition to the expenses shown by the said report, the undersigned, as such receiver, has incurred the following, which he believes was necessary to a faithful discharge of the duties imposed by said trust, as follows:

	1st. Personal expenses of the undersigned incurred as such receiver	$292.37
130	2d. Services of Robert Moore, civil engineer, in examining road and equipment (balance due)	166.65
	3rd. Counsel fee and legal services of James Elliott, rendered in the city of New York, in efforts to procure books and papers of the company withheld from receivers	250.00
	Total	709.02

All of which is respectfully submitted.

And the undersigned prays that the matters of account herein embraced be examined by the master in chancery, to the end that the same may be allowed to the undersigned by this honorable court, and the said receiver would further pray that he be fully discharged from all liability arising under said trust, and as in duty bound he will ever pray.

H. B. HAMMOND.

Subscribed and sworn before me this June 11th, 1875.
[SEAL.] GIDEON L. BARBER,
Notary Public.

(Endorsed:) Filed June 11, '75. W'm H. Bradley, cl'k.

131 Afterwards, to wit, on the 19th day of July, A. D. 1875, in the July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

STEPHEN OSGOOD
vs.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company et al. } In chancery.

Now comes the said complainant, by McDonald and Crawford, his solicitors, and moves the court to consolidate this cause with the cause pending in said court of William R. Fosdick and James D. Fish, against the said defendant said railroad company; and thereupon comes E. Walker, esq., solicitor for the said defendant, The Chicago, Danville and Vincennes Railroad Company, and interposes a demurrer to the amended bill of said complainant; and thereupon comes Mess'rs Lawrence, Winston, Campell, and Lawrence, solicitors for the defendant trustees Fosdick and Fish; and thereupon comes on to be heard the motion to consolidate, and after arguments of counsel, the court being sufficiently advised thereon, overrules said motion, but allows the said Os-
132 good and others to intervene in said cause of Fosdick and Fish, upon taking the proper and necessary steps therefor, for the protection of their respective interests.

And as to the demurrer filed herein, the court takes the same under advisement.

133 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the bill of complaint, with the exhibits thereto attached, filed in the circuit court of Will County, in the State of Illinois, on the 22d day of February, A. D. 1875, and of the order of said Will circuit court of the same date; said bill of complaint and said order being a portion of a transcript of the record of the proceedings had in said Will County circuit court, in the cause wherein Stephen Osgood was the complainant and Chicago, Danville and Vincennes Railroad Company was the defendant; said transcript of record having been filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois on the 24th day of March, A. D. 1875.

Also, of the motion filed March 27, A. D. 1875, of the certified copy of the order of Will County circuit court, filed May 5, A. D. 1875; of the report of receivers filed May 17, A. D. 1875; of the supplemental report of H. B. Hammond, receiver, filed June 11, A. D. 1875, and of
134 the order entered of record in said circuit court of the United States for the northern district of Illinois, on the 19th day of July, A. D. 1875, in said entitled cause; this transcript having been made under the writ of certiorari issued out of the Supreme Court of the United States of the date of the fifth day of February, A. D. 1878, and as directed by the counsel for the intervening petitioners in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 22d day of February, A. D. 1878, and of our Independence the one hundred and second year.

[SEAL.] WM H. BRADLEY,
Clerk.

1344 United States circuit court, northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH
v.
CHICAGO, DANVILLE AND VINCENNES RAILroad Company et al. } In chancery.

135 UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof, March term A. D. 1875.

WILLIAM R. FOSDICK AND JAMES D. FISH
vs.
CHICAGO, DANVILLE AND VINCENNES RAILroad Company. } In chancery.

To the judges of the circuit court of the United States for the northern district of Illinois:

William R. Fosdick, who is a resident and citizen of the State of New York, and James D. Fish, a citizen and resident of the State of New York, bring this their bill against the Chicago, Danville and Vincennes Railroad Company, which is a body politic and corporate, organ-
136 ized and existing under and by virtue of the laws of the State of Illinois, and a citizen of said State, and resident of and doing business in the northern district thereof, and thereupon your orators complain and say—

That the said defendant was organized as a corporation during the year A. D. 1865, under and by virtue of an act of the general assembly of the State of Illinois, entitled "An act to incorporate the Chicago, Danville and Vincennes Railroad Company, approved February 16th, A. D. 1865," and from thence hitherto has been and still is such corporation, and as such has been engaged in business under and by virtue of its said charter at and within the said northern district of Illinois.

Complainants further show unto your honors that the said corporation was by its said charter, among other things, authorized and empowered to locate, construct, and build a railroad, with a single or double track, from a point in Lawrence County, on the Wabash River, opposite Vincennes, in the State of Indiana, upon the most eligible route to and into the city of Chicago, by way of Paris, in Edgar County, and Danville, in Vermillion County, and to lay out and locate said road, not exceeding one hundred feet in width, through the whole length of said route; and in and by said charter said company were further au-
137 thorized and empowered to unite and consolidate its said railroad stock and property with that of any other railroad company or companies within this or any other State whose line or lines of road should cross or intersect the railroad authorized by said act or be built along or near the line thereof, upon such terms as should be mutually agreed upon between the said company and such other company, and to execute such contracts as should secure the object of such consolidation.

And in and by said charter said company were further authorized to borrow money on the credit of said company, not exceeding its authorized capital stock, at a rate of interest not exceeding ten per cent. per annum, payable semi-annually, and to execute bonds therefor, with said coupons annexed, and to secure the payment of the same by mortgage

or deed of trust on the whole or any part of the said railroad property and income of the company then existing or thereafter to be acquired.

And in and by said charter the directors of said corporation were further authorized to negotiate and sell the bonds of said company at such times and in such places, either within or without the estate, and at such rates and for such prices as in their opinion should best advance the interests of said company.

138 Your orators further show to your honors that thereafter, and prior to the 10th day of March, A. D. 1869, the capital stock of said corporation was the sum of two million five hundred thousand dollars; and that thereafter, and on the 10th day of March, A. D. 1869, the said corporation, for the purpose of constructing and putting in operation the said line of railroad before described, caused to be executed, under the hand of its president, and its corporate seal, twenty-five hundred bonds, each for the sum of one thousand dollars, payable in gold coin, on the 1st day of April, in the year one thousand nine hundred and nine, with interest at the rate of seven per cent. per annum, in gold coin, payable semi-annually, on the first days of April and October in each year, on the delivery of annexed warrants, in the city of New York, at such place as should be designated by said company. A copy of one of said bonds and one of the interest coupons and trustees' certificate thereto attached is attached to this bill, marked "Exhibit A," and made a part thereof.

Your orators further show to your honors that, for the purpose of securing the final payment of said issue of twenty-five hundred bonds, with all the interest to accrue thereon, the said corporation executed and delivered to the complainants, William R. Fosdick and James

139 D. Fish, as trustees, a mortgage and deed of trust, conveying to them as trustees, for the benefit of every holder of said bonds, or any of them, all of the railroad of said company extending from Chicago, in Cook County, in the State of Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, and thence southeasterly to a point on the State line of Indiana, with all its franchises, equipments, property, tools, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels connected with or used in the using or operating of said railroad, or appurtenant thereto; and all its rails, ties, fuel, fencing, and erections; and all its right of way and easements; and all cars, engines, and tools; and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said railroad company then had or owned and possessed, or might thereafter acquire, either in law or equity, of every kind whatever appurtenant thereto, a copy of which said mortgage is hereto attached, marked "Exhibit B," and made a part of this your orator's bill.

Your orators further allege that said trust-deed was duly executed under the hand of the president and secretary of said company, and under its corporate seal, and was on the said 10th day of March,

140 A. D. 1869, delivered to the said trustees, who then and there accepted the trust thereby created, and entered upon the performance of their duties as such trustees.

Your orators further allege that all of said twenty-five hundred bonds were certified by them, as such trustees, and were thereafter sold and disposed of by the said corporation, and that all of said twenty-five hundred bonds are now outstanding, and a valid, legal claim against the said corporation, and that the said trust-deed securing the same is

now a valid and subsisting first lien upon all of the said railroad property and franchises therein described.

Your orators further allege that heretofore, and on the 4th day of March, A. D. 1872, the said Chicago, Danville and Vincennes Railroad Company entered into articles of consolidation with the Rossville and Indiana Railroad Company, under and by virtue of which the said two corporations became and were a consolidated corporation, by the name and style of the Chicago, Danville and Vincennes Railroad Company. A copy of the said articles of incorporation is hereto attached, marked "Exhibit C," and made a part of this bill.

Your orators further show to your honors that thereafter, and
141 on the 9th day of March, A. D. 1872, the said Chicago, Danville and Vincennes Railroad Company entered into certain articles of consolidation with the Western Indiana Railroad Company, under and by virtue of which the said two corporations became and were a consolidated corporation by the name and style of the Chicago, Danville and Vincennes Railroad Company. A copy of the said articles of consolidation are hereto attached, marked "Exhibit D," and made a part of this bill.

Your orators further show to your honors that thereafter, and on the 6th day of May, A. D. 1872, the said Chicago, Danville and Vincennes Railroad Company entered into certain articles of consolidation with the Attica and Terre Haute Railroad Company, under and by virtue of which the said two corporations became a consolidated corporation, by the name and style of the Chicago, Danville and Vincennes Railroad Company. A copy of which said articles is hereto attached, marked "Exhibit E," and made a part of this bill.

Your orators further allege that the said corporation thereafter paid all of the coupons maturing upon said bonds, and each of them, up to and including the coupon maturing April 1st, A. D. 1873.

Your orators further allege that none of the coupons maturing
142 upon said bonds on the 1st day of October, 1873, the 1st day of April, 1874, the 1st day of October, 1874, have ever been paid, or in any way satisfied; but on the said days, and each of them, when said coupons fell due, the said company made default in the payment thereof, and said default has continued from thence hitherto, and still continues.

Your orators further allege that heretofore and subsequent to October 1st, 1873, the holders of said first-mortgage bonds, to the amount of one million eight hundred and two thousand dollars thereof, placed in the hands of your orator, William R. Fosdick, the coupons upon said bonds maturing October 1st, 1873, April 1st, 1874, October 1st, 1874, and April 1st, 1875; and each of the said holders respectively received from the said corporation a certificate of indebtedness for the amounts of the said coupons so placed in the hands of said Fosdick by them severally, which said certificates were each payable on the 1st day of April, A. D. 1879, with interest from and after February 1st, 1874, at seven per cent. per annum, payable semi-annually on the first days of August and February in each year, at the office or agency of said company in the city of New York, on delivery of interest-warrants annexed to said certificates, principal and interest payable in gold. And
143 in and by said certificate it was by said railroad company, among other things, agreed that in case of the non-payment of the interest thereon on demand when due, or in case of the non-payment of the coupons maturing October 1st, 1875, and thereafter, until the payment of said certificate, or in case of the non-payment of the principal

of said certificate on maturity, the holder thereof should be entitled to demand and receive from the said Fosdick the interest-coupons described in said certificate, and with all his rights to proceed against said company. A copy of one of said certificates is hereto attached marked "Exhibit F," and made a part of this bill.

Your orators further show to your honors that they are informed and believe, and therefore charge the fact to be, that the interest which fell due upon said certificates upon the 1st day of August, 1874, was paid by the said corporation, and that a portion of the interest which fell due upon said certificates on the 1st day of February, 1875, was also paid by said corporation; but that a large part of the interest upon said certificates which fell due February 1st, 1875, has not been paid by said corporation, and that said corporation has no funds wherewith to pay the same; and that said company is, in fact, insolvent, and will never be able to pay the balance of said interest due February
144 1st, 1875, upon said certificates, or any of the other interest-warrants upon said certificates, or the principal thereof, and will not be able to pay the coupons maturing upon said bonds, or any of them, October 1st, 1875, and thereafter, and that in consequence of said default and insolvency, the said several owners of said coupons so deposited with said trustee as aforesaid are authorized to demand and have from him a surrender thereof, and have full right to proceed against said company for the collection of said coupons under and by virtue of the terms and conditions of the said deed of trust.

Your orators further show to your honors that they are informed and believe, and therefore charge the fact to be, that a large number of judgments have been obtained against said railroad company, and that a large amount of the property of said company has been levied upon and attached to satisfy said judgments; and that said company are wholly unable to pay the same, or any part thereof, and are wholly unable to pay the interest upon its outstanding bonds, or to satisfy the floating indebtedness of said company, which your orators are informed and believe, and therefore charge, amounts to the sum of dollars.
145 Your orators further allege that, in consequence of the default of said railroad company in the payment of said interest coupons falling due October 1st, 1873, April 1st, 1874, and October 1st, 1874, and the continuance of said default, the right of said company to possess, use, occupy, manage, and operate the said railroad franchises and appurtenances, and to take, receive, and use the tools, rents, issues, incomes, and profits thereof, has ceased and determined under and by virtue of the provisions of the said mortgage hereinbefore mentioned.

Your orators further show to your honors that they have been required by the holders of more than one-half of the twenty-five hundred bonds to demand possession of the said railroad, property, franchises, and appurtenances of and from the said railroad company, and have made such demand in pursuance of said requirement, but that said railroad company has not delivered the possession thereof to your orators, but so to do have wholly neglected and refused.

Your orators further show unto your honors that they are informed and believe, and therefore charge the fact to be, that at least ninety per cent. of the said coupons which matured upon said bonds on the 1st day of October, 1873, have been duly presented for payment to the
146 said railroad company, and payment thereof demanded from said company, and that the same have never been paid, nor any part thereof; and that the holders of six hundred and ninety-eight of said bonds have never in any way consented to the continuance of said de-

fault, and that, in consequence of the continuance of said default without the consent of said holders of said six hundred and ninety-eight bonds, the principal and interest of all the said bonds have become due and payable, and that your orators, as trustees as aforesaid, under and by virtue of the provisions of said mortgage, and the authority therein conferred upon them, have declared the principal of all of said bonds to be due and payable, and have notified the said railroad company thereof.

Your orators further allege that they have been requested by the holders of a majority of said twenty-five hundred bonds to proceed to collect the principal and interest of said bonds by foreclosure and sale of said property.

Your orators further allege that in and by said trust deed it was, among other things, covenanted by the said railroad company that the said company would make and create a sinking fund for the redemption of said bonds, and each of them, by setting aside and depositing
147 with the sinking-fund commissioner or commissioners to be appointed by the party of the first part for that purpose, from and after the 1st day of April, in the year 1873, and annually thereafter until the maturity of said bonds, from net earnings of said roads and property, after the payment of all the interest of said bonds, an amount of money equal to the one-half of one per cent. of the principal amount of all such bonds then outstanding, which said sinking fund should be from time to time invested in the purchase of the bonds secured by said mortgage, or bonds of the Government of the United States, or of the State of Illinois, and the money accruing on any and all of such investments for interest, as fast as the same should be received, should be added to and paid into the said sinking fund, and compounded therein continuously, and reinvested in like manner with the other money of said fund; and that the same should be used solely to redeem and pay off the said twenty-five hundred bonds.

And your orators aver upon information and belief that the net earnings of said road and property for the year 1874, after deducting an amount sufficient to pay all the interest on said bonds, exceeded the amount of one-half of one per cent. of the principal of said bonds; and under and by virtue of the terms and conditions of said mortgage the said one-half of one per cent. should have been invested in a
148 sinking-fund, as provided by said mortgage, but that said company have never invested any amount whatever in said sinking fund, but have wholly broken the covenants in that behalf in said mortgage contained.

Your orators further allege that the said Chicago, Danville and Vincennes Railroad Company is now encumbered and embarrassed by a considerable floating and unsecured debt, amounting to several hundred thousand dollars, some portion of which is already in judgment, upon which executions have been issued and property of said company seized, and that suits are threatened against said company for a large amount of said unsecured indebtedness, the effect of which will be to interfere with the proper and successful operation of said road, and divert the income of said road, or a large portion thereof, from its proper application, and that all of said floating indebtedness is subject to the lien of said trust-deed to your orators hereinbefore described, and all of the income of said road is properly applicable, first, to the payment of the interest on said bonds, and that the diversion of the same to the payment of said unsecured indebtedness, which is and shall be placed in judgment, would greatly injure and prejudice the rights of the

holders of said bonds and coupons, and can only be averted by
149 placing the said railroad and its appurtenances covered by said mortgage in the hands of a receiver to be appointed by this honorable court.

Inasmuch, therefore, as your orators are remediless in the premises at and by the strict rules of the common law, and can have adequate relief only in a court of equity, to the end therefore that the said defendant may answer upon oath or under its corporate seal, according to the course and practice of this court, all and singular the premises, and that the amount due, owing, and unpaid, for principal and interest on the said mortgage bonds, to the amount of two millions five hundred thousand dollars, may be ascertained, adjudged, and determined, and that the payment thereof by said defendant may be decreed by this court, and that all accounts and equities arising between the holders of said bonds and any parties who may have acquired liens upon said property, or any part thereof, may be settled by this honorable court; and that all and singular the said line of railroad, with its appurtenances, franchises, and rolling-stock, equipment, and all the other properties, premises, rights, and things mentioned in and covered and embraced by the said deed of trust bearing date the 10th day of March, A.
150 D. 1869, may be adjudged and decreed to be sold at public auction by or under the direction of this court, by a master or special commissioner or other officer of this court, or other suitable person or persons, according to the course and practice in cases of mortgage foreclosure of such character, and that the same may be actually so sold; and that upon such sale and the conveyance and conveyances to be thereupon executed, the defendant in this action, and all persons claiming or to claim under it subsequently to the commencement of this action as purchasers, encumbrancers, or otherwise to his receivership, may be absolutely and forever barred and foreclosed from all right, claim, title, lien, or equity of redemption in, to, or in respect of the premises, properties, rights, and franchises so sold and conveyed, and that the actual possession of said premises, properties, rights, and franchises so sold and conveyed may be decreed to be delivered to the purchaser and grantee, and that such sale may be declared to be in execution and enforcement of the said mortgage-lien created by the said deed of trust of March 10th, A. D. 1869, and that from and out of the proceeds of such foreclosure sale, your orators may be paid their costs and expenses in this action and such sums as the court shall adjudge to be properly due and payable to them for their disbursements and their proper compensation or commissions as
151 trustees under said trust deed, and that the residue of the proceeds of such foreclosure sale, or so much thereof as shall be requisite for the purpose, may be paid over and applied, under the direction and in pursuance of the order and decree of this court, to the payment of the accounts adjudged to be due or owing or unpaid for principal and interest on said bonds for the aggregate amount of two million five hundred thousand dollars, and the unpaid coupons upon the same, and that the same may be so paid to the respective holders of such bonds, in accordance with the respective rights and equities of the holders of these bonds, as may be adjudged and determined by this court, and under such conditions and in such manner as to the court may seem fit, and that, pending this suit, a receiver may be appointed of all and singular of the said railroad, with all its appurtenances, franchises, rolling-stock, or equipment, and all the income and earnings thereof, and all other of said mortgaged premises, properties, rights, and equities,

with such orders and directions in respect to such receivership and the fruits thereof as shall be equitable and proper; and that your orators may have such other and further relief decreed in the premises as may be agreeable to equity.

And may it please your honors to grant unto your orators the
152 writ of subpœna issuing out of and under the seal of this honorable court, according to the rules and practice thereof, directed to the defendant, The Chicago, Danville and Vincennes Railroad Company, therein and thereby commanding the said defendant, on a certain day, with a certain penalty therein to be inserted, to be and appear before this honorable court, then and there to answer all and singular the premises, and to stand to and abide by and perform such order, direction, and decree therein as to your honors shall seem meet and to equity appertain.

W'M R. FOSDICK AND JAMES D. FISH,
By GEO. C. CAMPBELL, *their Solicitor.*

LAWRENCE, WINSTON, CAMPBELL AND LAWRENCE,
Solicitors and of Counsel.

153 STATE OF ILLINOIS,
County of Cook, ss:

William R. Fosdick, being first duly sworn, states on oath that he is one of the complainants in the foregoing bill; that he has read the same and knows the contents thereof; that the matters and things therein stated are true to the best of his knowledge, information, and belief, as to all the matters therein stated on information and belief, and the matters and things therein stated as of his own knowledge, are true in substance and in fact.

W'M R. FOSDICK.

Sworn and subscribed to before me this twenty-seventh day of February, A. D. 1875.

[SEAL.] WILLIAM S. MILLIGAN,
Notary Public.

(Endorsed:) Filed Feb'y 27th, 1875. W'm H. Bradley, clerk.

(Indorsed:) U. S. circuit court, north. dist. Illinois. W'm R. Fosdick et al. vs. C., D. and V. R. R. Co. Bill. Filed Febr'y 27th, 1875. W'm H. Bradley, clerk. Lawrence, Winston, Campbell and Lawrence, compl'ts' sol'c'rs.

154 United States circuit court, northern district of Illinois.

SATURDAY, *April* 28, *A. D.* 1877.

Present, Hon. Thomas Drummond, judge.

WILLIAM R. FOSDICK ET AL.
v.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company et al. } In chancery.

In the matter of the intervening claims of Western Mining and Transportation Company and Vigo Car Company.

And now at this day, by consent of the parties hereto, Mess'rs Lawrence, Campbell and Lawrence, appearing for said complainants, E. Walker, esq., for said defendants, Mess'rs Crawford & McConnell for

intervening bondholders, and R. Biddle Roberts, esq., for said intervening petitioners: On motion of counsel for said petitioners, it is ordered, adjudged, and decreed that the clerk of this court pay to the said Western Mining and Transportation Company, or its solicitor, the sum of seventeen hundred and sixty dollars and sixty-eight cents, and to the Vigo Car Company, or its solicitor, the sum of one hundred and seventy-six dollars and eighty cents out of the fund remaining in court in said cause.

155 In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH
vs.
CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY. } In chancery.

Upon a hearing of the petition of Adna Anderson, receiver in the above entitled cause filed herein on this the 13th day of December, A. D. 1875, and the court being satisfied that there is due from the Chicago, Danville and Vincennes Railroad Company to the Bristol and South Wales Railway Waggon Company (limited), of England, the sum of eight hundred eighty-six and $\frac{50}{100}$ dollars ($886\frac{50}{100}$) as rental of or monthly payments from January 1st to February 22d, A. D. 1875, upon fifty box cars sold by the last named company to said railroad company under contract of October 29th, A. D. 1874, with interest thereon;

Also under contract of the same date from William A. Adams, of England, to the said railroad company for the rental and sale of fifty other box-cars, there is likewise due the said Adams as rental on said
156 cars, or monthly payments upon said contract from the first day of January, A. D. 1875, to the 22d day of February, A. D. 1875, the sum of eight hundred eighty-six and $\frac{50}{100}$ dollars ($886\frac{50}{100}$), with interest thereon;

And it also appearing that all the monthly payments have been made upon each of said contracts with the exception of the above stated time, and that the use of said cars is necessary to the operation of said road and that their possession cannot be retained and their ownership acquired by said company, except upon the condition that all such monthly payments be made by said company:

It is therefore ordered that the said Adna Anderson, receiver, &c., be and he is hereby authorized to make each of the above-named payments, together with interest thereon at the rate of seven per centum per annum, out of the current receipts of said road, and also such other monthly payments as may become due under said contracts and each of them.

(Endorsed:) Monday, Decb. 13th, 1875. Blodgett, judge.

157 In circuit court of the United States in & for the northern district of Illinois.

WILLIAM R. FISH AND ANOTHER
v.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company and others. } Bill.

JAMES W. ELWELL
vs.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company and others. } Cross-bill.

In the matter of the petitions of Michael Kelly, Charles Hesse, the First National Bank of Danville, Illinois, C. L. English & Co., Dickason & English and Alvin Gilbert.

This cause coming on to be heard upon the petitions of the above-mentioned parties, and the master's reports of the facts in relation to the claims in said petitions set forth, and the court being now fully advised, it is ordered that the petitions of said Alvin Gilbert, Dickason & English, and C. L. English & Co., and the petition of the First National Bank of Danville, except as to the amount of a certain draft, dated Feb. 15th, 1875, for $3,092.03 in the petition of the First National Bank of Danville hereinafter designated and ordered paid, be,
158 and the same are, and each of them is, dismissed without prejudice.

And as to the petition of Michael Kelly it is found by the court that there is due to said Kelly in addition to claims already allowed by the def't company the sum of $10,797.31, with lawful interest thereon from August 14th, 1874, to June 24th, 1875, and $7.10 costs of suit, upon a certain judgment by him recovered in the Vermillion County circuit court, and the sum of $2,652.08, with interest from Aug. 14th, 1874, to June 24th, 1875, and $6.85 costs, upon a certain other judgment in said Vermillion County circuit court by said Kelly recovered, and the sum of $761.38 upon a certain judgment for $3,997.50 recovered by said Kelly in the Vermillion circuit court Aug. 15th, 1874, with interest from Feb. 11th, 1875, to June 24, 1875, and also the sum of $84.04 of accrued interest upon the same judgment, and $7.10 costs; and that said Kelly is entitled to a lien for, and the payment of, these several sums, and interest, out of the assets of said def't company, whereupon said three judgments should be satisfied in full, and that two notes of said company now in the hands of said Kelly, one for $1,259.64 & the
159 other for $793.22, should be cancelled and surrendered, being already paid, as appears from the report of the master.

And it is thereupon ordered by the court that the receiver of this court herein pay to the said Michael Kelly or his solicitors, so soon as in his judgment such payment may be reasonably made, the several sums enumerated as aforesaid, & interest from the dates given as aforesaid, taking his or their receipt therefor.

And as to the petition of said Charles Hesse, it is found by the court that there is due to said Hesse the sum of $2,956.79 upon a certain judgment recovered by said Hesse in the Vermillion County circuit court on the 13th day of August, A. D. 1874, for $3,956.79, with interest from Nov. 7th, 1874, to June 24th, 1875, and also the sum of $61.29 accrued interest and $8.50 costs of suit, and that said Charles Hesse is entitled to a lien for, & the payment of, these several sums & interest out of the assets of said def't company, whereupon said judgment should be satisfied in full.

And it is thereupon ordered by the court that the receiver of this court herein pay to said Charles Hesse or his solicitors, as soon as in his judgment such payment may be reasonably made, the several
160 sums enumerated as aforesaid, with interest from the dates given as aforesaid, & take his or their receipt therefor.

And as to the petition of the First National Bank of Danville, Illinois, it is found by the court that there is due to said bank the sum of $3,092.03, with interest from the 10th day of March, A. D. 1875, to June 24th, 1875, for which sum and interest said bank is entitled to a lien & to the payment thereof out of the assets of said defendant company in the hands of the receiver herein; & it is thereupon ordered by the court that the receiver of this court herein pay to said First National Bank of Danville, Illinois, or its solicitors, as soon as in his judgment such payment may be reasonably made, the said sum & interest, & take his or their receipt therefor.

O. K.

E. WALKER, *Sol. for Co.*

(Endorsed:) Order No. 2. Feb. 22, '76.

161 In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH *vs.* CHICAGO, DANVILLE AND VINCENNES RAILroad Company et al. } In chancery.

This cause coming on to be heard upon the petition of the receiver asking instructions of the court relative to the claim of Mess'rs Roelle Junker and Company, filed with said receiver, and by him brought to the attention of the court by his said report of July 31st, 1875, and subsequently by order of the court referred to the master to hear proof and report the evidence touching said claim, and the said master having made his said report and returned the same with the evidence, as ordered; and the court having sufficiently considered said report and evidence, and being satisfied that there is due the said Mess'rs Roelle Junker and Company from the said Chicago, Danville and Vincennes Railroad Company the sum of twenty-five hundred seventy-two and $\frac{04}{100}$ dollars ($2,572$\frac{04}{100}$), and that said sum is the balance due said
162 firm for an advance of five thousand dollars ($5,000) on account of freights made by said Roelle Junker and Company to said railroad company on the eighth day of December, A. D. 1874, upon which said account the receivers have credited the said railroad company with freight bills prior to the first day of August, 1875, to the amount of $2,427.96 leaving a balance of $2,572$\frac{04}{100}$ still due as reported by the said master:

It is therefore ordered that the said master's report be approved and confirmed, and that the said receiver have full authority to settle the said account and pay to the said Roelle Junker and Co. the amount so found due them, out of any monies in his hands as such receiver that can be reasonably applied to such payment, taking proper receipts and vouchers therefor.

We are content that said order be entered in said cause.

LAWRENCE, CAMPBELL AND LAWRENCE.
For Complainants.

HENRY CRAWFORD,
For Intervening Bondholders.

E. WALKER,
163 *For C. D. and V. R. R. Co., Defendant.*

(Endorsed:) Order of Mar. 28, '76. Drummond, J.

164 In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH
vs.
CHICAGO, DANVILLE AND VINCENNES RAILroad Company et al. } In chancery.

This cause coming on to be heard upon the petition of the receiver asking instructions of the court relative to the claim of Egbert Phelps, filed with said receiver, and by him brought to the attention of the court in his said report dated July 31st, 1875, and subsequently by order of the court referred to the master to hear proof and report the evidence touching said claim, and the said master having made his said report and returned the same, with the evidence, as ordered, and filed herein on the 28th day of February, 1876, and the court having sufficiently considered said report and evidence, and being satisfied that there is due the said Egbert Phelps from the said Chicago, Danville and Vincennes Railroad Company the sum of two hundred dollars ($200) for professional services rendered said company subsequent to August
165 1st, A. D. 1874, the court therefore finds that there is due the said Egbert Phelps the said sum of two hundred dollars ($200).

It is therefore ordered and adjudged that the report of the master as to the claim of the said Egbert Phelps be in all things confirmed, and that the said receiver have full authority to settle the said account and pay to the said Egbert Phelps the amount so found due him out of any monies in his hands as such receiver that can be reasonably applied to such payment, taking the proper receipts and vouchers therefor.

We consent that this order be entered.

CRAWFORD & McCONNELL,
LAWRENCE, CAMPBELL & LAWRENCE,
Sol'rs for Trustees.

E. WALKER,
Sol'r for Co.

166 In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK & JAMES D. FISH
v.
THE CHICAGO, DANVILLE & VINCENNES RAILroad Co. } In equity.

In the matter of the intervening petition of G. S. Hubbard, j'r.

This cause came on further to be heard this day, upon the intervening petition of G. S. Hubbard, j'r, & the report of Henry W. Bishop, one of the masters in chancery of this court, upon the same, which said report, bearing date of the 13th day of April, 1876, not being excepted to, is in all things affirmed and approved.

And thereupon, upon consideration of the matters aforesaid & it appearing to the court that there is due to said G. S. Hubbard, j'r, the petitioner, the sum of five hundred dollars for rent of certain lands & premises used & occupied by the said defendant as a general freight & ticket office for the months of November & December, A. D. 1874, & January, A. D. 1875:

It is therefore ordered & decreed by the court that the receiver
167 heretofore appointed in this cause pay to the said G. S Hubbard, j'r, the said petitioner, or his solicitor, the said sum so reported & found due by the said master out of the nett earnings & receipts of said railroad in his hands.

The above order for $500.00 (the interest having been remitted) is consented to by us.

LAWRENCE, CAMPBELL, LAWRENCE,
Compl't's Sol'rs.

E. WALKER,
Sol'r for C., D. & V. R. Co.

CRAWFORD & McCONNELL.

(Endorsed :) Order Ap'l 29, '76. Drummond, j.

168 In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK ET AL.
v.
CHICAGO, DANVILLE AND VINCENNES RAILroad Company et al. } In chancery.

In the matter of the intervening petition of Joseph M. Ranney.

This day came on to be heard the said intervening petition of Joseph M. Ranney, Mess'rs Lawrence, Campbell & Lawrence appearing for the said complainants, E. Walker, esq., for said defendants, Mess'rs Crawford and McConnell for intervening bondholders, and Samuel M. Booth for said petitioner, and thereupon, by consent of counsel, the court finds that there is due the said petitioner from said railroad company the sum of seventy-nine and $\frac{81}{100}$ dollars, and on motion it is ordered that Adna Anderson, receiver appointed herein, pay to said petitioner or his solicitor, on receipt of either, the sum of seventy-nine and $\frac{81}{100}$ dollars, the amount as aforesaid found by the court to be due him, and that said receiver make such payment as soon as the same can be done consistently with the proper operation of the road and the payment of claims heretofore allowed.

Correct.

H. C.

169 (Endorsed:) February 26, 1877. Drummond, j.

170 2, '77. Drummond, judge.

FOSDICK & FISH
v.
C., D. & V. R. R.

In the matter of the claim of Jeshua Walker.

On motion of Joseph Riskine, esq., solicitor for Joshua Walker, intervening claimant, and by consent of Crawford & McConnell, sol's for the purchasers of said railroad, it is ordered by the court that the order of April 30th, 1877, allowing the claim of said Walker for the sum of one thousand dollars be so amended as to change the amount thereof to

the sum of twelve hundred & ninety-five dollars, that being the amount reported by the master as due to the said Walker.

(Endorsed:) Drummond, judge. May 12, '77.

171 WILLIAM R. FOSDICK ET AL.
vs.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company. } In chancery.

In the matter of the intervening petition of Charles D. Sherman, receiver of the Fourth National Bank of Chicago.

Now come the parties, by their solicitors, and the court having heard the petition of Charles D. Sherman, receiver of said bank, and considdered the report of the master, together with the evidence accompanying the same, and the counsel for the purchasers not objecting thereto, it is ordered that the clerk of this court be, and is hereby, directed to pay to Messr's Peckham and Brown, counsel herein for said Charles D. Sherman, receiver, out of the fund in said cause, the sum of two hundred and fifty dollars ($250), in settlement of the claim of said Charles D. Sherman, made in said application on the fund in the hands of said clerk.

Correct.
June 22, '77. T. D.

We consent that this order may be entered.
CRAWFORD & McCONNELL,
Sol's for Intervening Bond's and Purchasers.

(Endorsed:) June 22, '77.

172 In the circuit court of the United States for the northern district of Illinois.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

WILLIAM R. FOSDICK AND JAMES D. FISH
vs.
THE CHICAGO, DANVILLE & VINCENNES Railroad Co. et al.

In the matter of the intervening petition of Samuel Simons.

This day came on to be heard the intervening claim of Samuel Simons in the above cause, and thereupon on motion of N. M. Jones, solicitor for said intervening petitioner, it is ordered that the prayer of said petition be and is hereby granted.

And it is further ordered that William H. Bradley, esq., clerk of said court, pay to the said petitioner or his solicitor, on receipt of either, out of the funds in said cause, the sum of twenty-five hundred and thirty dollars ($2,530.00) upon the execution and delivery by said Samuel Simons and wife to said defendant, The Chicago, Danville & Vincennes Railroad Company, of a good and sufficient deed of the premises described in said petition.

We consent that the above order may be entered.
CRAWFORD & McCONNELL.

173 (Endorsed:) July 2, 1877. Drummond, j.

174 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States, northern district of Illinois.

WILLIAM R. FOSDICK & JAMES D. FISH
vs.
THE CHICAGO, DANVILLE & VINCENNES RAILroad Company.

In the matter of the intervening petition of Dwight L. Parker et al., executors, &c., of John Chamberlin, dec'd.

On this day came on for hearing the intervening petition of Dwight L. Parker, Micajah Stanley and Wilson S. Kay, executors of the estate of John Chamberlin, deceased, heretofore filed in the above-entitled cause, and on motion of N. M. Jones, petitioner's solicitor, it was thereupon ordered by the court that the said intervening petition be and is hereby granted.

It is further ordered that upon the execution and delivery by the said intervening petitioners of a good and sufficient deed of conveyance of the premises described in said petition to the defendant, The Chicago, Danville & Vincennes Railroad Company, William H. Bradley, esquire, clerk of said court, shall pay out of the funds in this cause to
175 said intervening petitioners as executors as aforesaid, the sum of ten hundred & twenty-three & $\frac{75}{100}$ dollars ($1,023.75), and shall take from said petitioners or their solicitor a receipt for the same.

Correct.
July 30, '77.

T. D.

We have examined the claim of the petitioners, and know it to be a just one, and are willing that this order may be entered.

CRAWFORD & McCONNELL,
Counsel for Bondholders.

(Endorsed:) July 30, '77.

176 In the circuit court of the U. S., northern district of Illinois.

WM R. FOSDICK AND JAMES D. FISH
vs.
THE CHICAGO, DANVILLE & VINCENNES R. R. Co. et als. } In chancery.

In the matter of the intervening petition of Norman Williams and John L. Thompson.

This cause coming on to be heard on said petition, and it appearing that said petition was heretofore, by order of this court, referred to Henry W. Bishop, master in chancery of this court, to take proof and report, and the said master having reported that there is due to the said Williams & Thompson from the receiver of said R. R. for occupation of land as stated in said petition the sum of $426.13, it is therefore ordered, no objection being made thereto, that the amount so reported to be due by the master be paid out of the fund now in court for that purpose, and the clerk of this court is hereby directed to pay said sum of

four hundred & twenty-six dollars and thirteen cents to said Williams & Thompson, and take their receipt therefor.

Correct.
Aug. 9, '77.

T. D.

177 H. C. The Williams & Thompson matter, I believe, is correct.

F. W. H.

$\frac{8}{9}$. O. K.

H. CRAWFORD.

(Endorsed:) August 9th, 1877.

178 Circuit court of the United States, northern district of Illinois.

WILLIAM R. FOSDICK ET AL.
vs.
THE CHICAGO, DANVILLE & VINCENNES RAILroad Company. } In chancery.

Intervening petitions of John H. Nolan and De Witt C. Collins.

This cause coming on to be heard this day upon the report and supplemental report of the master in chancery, to whom the intervening petitions have been referred, and it appearing to the court from said reports and other facts within the knowledge of the court that the amount of rent due from the receiver of the Chicago, Danville and Vincennes Railroad Company, for the occupation of the premises described in said petitions, is the sum of six hundred and seventy-two dollars ($672), to wit, five hundred and twenty dollars ($520) from January 1st, 1876, to January 1st, 1877, and one hundred and fifty-two dollars ($152) from January 1st, 1877, to April 18th, 1877; and the solicitors for the respective parties, viz, Morris, McRae & Singleton for John H. Nolan, Williams & Thompson for De Witt C. Collins, and Crawford & McConnell
179 for the intervening bondholders and purchasers, appearing, and consenting in open court that the money so due as aforesaid may be paid to the petitioner, De Witt C. Collins, and the court being fully advised in the premises, doth order and decree that the said sum of six hundred and seventy-two (672) dollars, be paid by the clerk of this court out of funds in his hands for that purpose to the said De Witt C. Collins, and that he take the receipt of the said Collins or his solicitor, and the receipt of said Nolan or his solicitor, in full extinguishment of the said demand against said receiver or the fund in court.

This order is satisfactory.
Sept. 27, '77.

H. CRAWFORD.

Correct.
Oct. 1, '77.

T. D.

(Endorsed:) October 1, 1877. Drummond, J.

180 In the United States circuit court, northern district of Ill's.

IN THE MATTER OF THE CLAIM OF HENRY Block for land taken for the right of way by the Chicago, Danville & Vincennes R. R. Co. } October term, A. D. 1877.

On reading and filing the petition of Henry Block, the above named

174 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States, northern district of Illinois.

WILLIAM R. FOSDICK & JAMES D. FISH
vs.
THE CHICAGO, DANVILLE & VINCENNES RAILroad Company.

In the matter of the intervening petition of Dwight L. Parker et al., executors, &c., of John Chamberlin, dec'd.

On this day came on for hearing the intervening petition of Dwight L. Parker, Micajah Stanley and Wilson S. Kay, executors of the estate of John Chamberlin, deceased, heretofore filed in the above-entitled cause, and on motion of N. M. Jones, petitioner's solicitor, it was thereupon ordered by the court that the said intervening petition be and is hereby granted.

It is further ordered that upon the execution and delivery by the said intervening petitioners of a good and sufficient deed of conveyance of the premises described in said petition to the defendant, The Chicago, Danville & Vincennes Railroad Company, William H. Bradley, esquire, clerk of said court, shall pay out of the funds in this cause to
175 said intervening petitioners as executors as aforesaid, the sum of ten hundred & twenty-three & $\frac{75}{100}$ dollars ($1,023.75), and shall take from said petitioners or their solicitor a receipt for the same.

Correct.
July 30, '77.

T. D.

We have examined the claim of the petitioners, and know it to be a just one, and are willing that this order may be entered.

CRAWFORD & McCONNELL,
Counsel for Bondholders.

(Endorsed:) July 30, '77.

176 In the circuit court of the U. S., northern district of Illinois.

WM R. FOSDICK AND JAMES D. FISH
vs.
THE CHICAGO, DANVILLE & VINCENNES R. R. Co. et als. } In chancery.

In the matter of the intervening petition of Norman Williams and John L. Thompson.

This cause coming on to be heard on said petition, and it appearing that said petition was heretofore, by order of this court, referred to Henry W. Bishop, master in chancery of this court, to take proof and report, and the said master having reported that there is due to the said Williams & Thompson from the receiver of said R. R. for occupation of land as stated in said petition the sum of $126.13, it is therefore ordered, no objection being made thereto, that the amount so reported to be due by the master be paid out of the fund now in court for that purpose, and the clerk of this court is hereby directed to pay said sum of

four hundred & twenty-six dollars and thirteen cents to said Williams & Thompson, and take their receipt therefor.

Correct.
Aug. 9, '77.

T. D.

177 H. C. The Williams & Thompson matter, I believe, is correct.
F. W. H.

8/9. O. K.

H. CRAWFORD.

(Endorsed:) August 9th, 1877.

178 Circuit court of the United States, northern district of Illinois.

WILLIAM R. FOSDICK ET AL.
vs.
THE CHICAGO, DANVILLE & VINCENNES RAILroad Company. } In chancery.

Intervening petitions of John H. Nolan and De Witt C. Collins.

This cause coming on to be heard this day upon the report and supplemental report of the master in chancery, to whom the intervening petitions have been referred, and it appearing to the court from said reports and other facts within the knowledge of the court that the amount of rent due from the receiver of the Chicago, Danville and Vincennes Railroad Company, for the occupation of the premises described in said petitions, is the sum of six hundred and seventy-two dollars ($672), to wit, five hundred and twenty dollars ($520) from January 1st, 1876, to January 1st, 1877, and one hundred and fifty-two dollars ($152) from January 1st, 1877, to April 18th, 1877; and the solicitors for the respective parties, viz, Morris, McRae & Singleton for John H. Nolan, Williams & Thompson for De Witt C. Collins, and Crawford & McConnell
179 for the intervening bondholders and purchasers, appearing, and consenting in open court that the money so due as aforesaid may be paid to the petitioner, De Witt C. Collins, and the court being fully advised in the premises, doth order and decree that the said sum of six hundred and seventy-two (672) dollars, be paid by the clerk of this court out of funds in his hands for that purpose to the said De Witt C. Collins, and that he take the receipt of the said Collins or his solicitor, and the receipt of said Nolan or his solicitor, in full extinguishment of the said demand against said receiver or the fund in court.

This order is satisfactory.
Sept. 27, '77.

H. CRAWFORD.

Correct.
Oct. 1, '77.

T. D.

(Endorsed:) October 1, 1877. Drummond, J.

180 In the United States circuit court, northern district of Ill's.

IN THE MATTER OF THE CLAIM OF HENRY Block for land taken for the right of way by the Chicago, Danville & Vincennes R. R. Co. } October term, A. D. 1877.

On reading and filing the petition of Henry Block, the above named

claimant, and on reading and filing the stipulation attached to said petition, and on the delivery to the said railroad company the deed referred to in said petition, on motion of Chester Kinney, solicitor for said petitioner, it is ordered, adjudged, and decreed by the court that the petitioner be paid and allowed out of the proper funds of said R. R. Co. the sum of twenty-five dollars ($25) in addition to the sum of one hundred dollars heretofore ordered paid, and that the said sum of one hundred and twenty-five dollars be paid immediately in full satisfaction of said claim, and that said Henry Block execute and deliver his receipt therefor.

Correct.
Oct. 4, '77.

T. D.

We consent to the entry of this order.

CRAWFORD & McCONNELL.

(Endorsed:) October 4, 1877. Drummond, J.

181 In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK & JAMES D. FISH
v.
THE CHICAGO, DANVILLE & VINCENNES RAILROAD Co. } In chancery.

In the matter of the intervening petition of Philo Carpenter.

This cause coming on to be heard before his honor Judge Drummond, upon the master's report and proofs taken upon said intervening claim, the said petitioner appearing by A. D. Rich, his solicitor, and the other parties in interest by Mess. Crawford and McConnell, their solicitors, and the same having been argued by the respective solicitors, and the court being fully advised in the premises, it is hereby ordered, adjudged, and decreed that out of the proceeds now in court of the sale of the Chicago, Danville and Vincennes Railroad and its appurtenances, the sum of eight hundred and fifty (850) dollars be paid to said intervening petitioner or his said solicitor in full of said petitioner's claim upon said funds; and the clerk of this court is ordered to pay said sum accordingly.

Correct.
Nov. 1, '77.

T. D.

182 Correct.

H. C.

(Endorsed:) Nov. 1st, 1877. Before Judge Drummond.

183 In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK ET AL.,
vs.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Co. } In chancery.

It is hereby stipulated and agreed by & between the parties to the above-entitled cause, that the intervening claim of William Sidney Smith be allowed and payment directed to be made out of the moneys now in

court, proceeds of sale in the above-entitled cause, for the net sum of twenty-one hundred and twenty dollars ($2,120).

F. W. HUIDEKOPER,
JOHN M. DENISON,
T. W. SHANNON,
By F. W. HUIDEKOPER,
Purchasers C. D. and V. R.

(Endorsed:) Filed Nov. 3d, 1877. W'm H. Bradley, cl'k.

184 *Intervening petition of Nicholas Feuerstein.*

In the United States circuit court for the northern district of Illinois.

FOSDICK AND FISH
vs.
CHICAGO, DANVILLE AND VINCENNES RAILroad Company.

This cause coming on to be heard upon the intervening petition of Nicholas Feuerstein, and the same having been duly considered, and counsel for said petitioner and counsel for bondholders and purchasers consenting, it is hereby ordered that the clerk pay to said Nicholas Feuerstein or his solicitor, taking a proper voucher therefor, the sum of six hundred ($600) dollars out of the fund in said cause.

Correct.
Dec. 11, '77.

T. D.

We consent that this order may be entered as per petition this day filed.

CRAWFORD & McCONNELL,
For Bondholders and Purchasers.

(Endorsed:) Draft of Dec. 11, '77.

185 Intervening petition of Abraham Germand.

United States of America, northern district of Illinois.

WILLIAM R. FOSDICK & JAMES D. FISH
vs.
CHICAGO, DANVILLE & VINCENNES RAILROAD Company. } In chancery.

Now come W. F. Townsend, solicitor for petitioner, and Crawford and McConnell, solicitors for intervening bondholders and purchasers, and the said petition being considered and the allegations of the same having been admitted: Now, therefore, it is ordered that the clerk of this court pay to the petitioner, or his solicitor, W. F. Townsend, the sum of seven hundred dollars in consideration of the damage, rental, and default as shown in the said petition of the Chicago, Danville and Vincennes Railroad Company and of the receiver of this court, and that the clerk of the court take as payment of said money an appropriate receipt therefor.

Correct.
Dec'r 27, '77.

T. D.

We consent to the entry of this order.

CRAWFORD & McCONNELL,
For Bondholders & Purchasers.

185½ (Endorsed:) Dec'b. 27th, 1877, before Drummond, judge.

186 FOSDICK ET AL.
vs.
THE CHICAGO, DANVILLE & VINCENNES RAILroad Co.

In the matters of the intervening petition of Oliver Shelby and of John Bodine and of James Graham.

Come now the petitioners, by Ristine and McWilliams, their attorneys, and the said petitions having been presented and the intervening bondholders appearing by their counsel, the said petitions being duly sworn to and admitted by the counsel for said bondholders, it is ordered, adjudged, and decreed by the court that there be paid by the clerk of this court out of the fund in this cause to Oliver Shelby, or Ristine & McWilliams, his solicitors, three hundred dollars; to John Bodine, or to Ristine & McWilliams, his solicitors, two hundred and seventy-five dollars; and to James Graham, or to Ristine & McWilliams, his solicitors, one hundred & fifty dollars, the payments to be made on satisfactory evidence to be furnished to the clerk that the petitioners have conveyed the respective rights of way to the railroad co.

Correct.
Jan'y 3, '78.

T. D.

187 We have examined the petitions referred to in the above order and are satisfied that the amounts claimed should be allowed. We therefore consent to the entry of the order.

CRAWFORD & McCONNELL,
For Intervening Bondholders, &c.

(Endorsed:) Jan'y 3d, 1878, before Judge Drummond.

188 *Intervening petition of W. H. Mallory.*

Circuit court of the United States, northern district of Illinois.

WILLIAM R. FOSDICK & JAMES D. FISH
vs.
THE CHICAGO, DANVILLE & VINCENNES RAILroad Company.

Now comes the petitioner and the intervening bondholders and purchasers, by counsel, and the said petition being presented, the same having been sworn to, and the facts alleged therein being admitted by the counsel for bondholders, it is ordered that the clerk of the court pay to W. H. Mallory the sum of $800.00 out of the fund in this cause upon the said Mallory delivering a proper conveyance of the premises described in his petition.

Correct.
Jan'y 6, '78.

T. D.

We consent to the entry of this order.

CRAWFORD & McCONNELL,
For Intervening Bondholders.

(Endorsed:) Order' Jan'y 4th, 1878, before Judge Drummond.

189 *Intervening petition of George and Mary Dow.*

Circuit court of the United States, northern district of Illinois

WILLIAM R. FOSDICK & JAMES D. FISH
vs.
THE CHICAGO, DANVILLE & VINCENNES RAILroad Company. } In chancery.

Now come the petitioners, by McCagg, Culver & Butler, their solicitors, and the intervening bondholders and purchasers by Crawford & McConnell, their solicitors, and the said petition being considered and the facts therein alleged having been admitted: Now, therefore, it is ordered that the clerk pay to the said George Dow and Mary Dow or their solicitors the sum of two thousand dollars out of the fund in this cause.

Correct.
Jan'y 16, 1'78.

T. D.

(Endorsed:) Order' Jan'y 16th, 1878, before Judge Drummond.

190 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be true, correct, and complete transcripts of the original bill of complaint, filed February 27, A. D. 1875, and of the order entered of record on April 28, A. D. 1877, and of the drafts or memoranda, with all the endorsements thereon, from which the orders were entered of record in the cause wherein William R. Fosdick and James D. Fish are the complainants, and The Chicago, Danville and Vincennes Railroad Company et al. are the defendants, on the following dates: December 13, A. D. 1875; February 22, A. D. 1876; March 28, A. D. 1876; April 1, A. D. 1876; April 29, A. D. 1876; February 26, A. D. 1877; May 12, A. D. 1877; June 22, A. D. 1877; July 2, A. D. 1877; July 30, A. D. 1877; August 9, A. D. 1877; October 1, A. D. 1877; October 4, A. D. 1877; November 1, A. D. 1877; November 3, A. D. 1877; December 11, A. D. 1877; December 27, A. D. 1877; January 3, A. D. 1878; January 4, A. D. 1878; and January 16, A. D. 1878, this transcript having been made under the writ of certiorari issued out of the Supreme Court of the United States, of the date of the fifth day of February, A. D. 1878, and hereto attached, and under the specific direction of the counsel for the intervening petitioners in said cause.

191 In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this twenty-second day of February, A. D. 1878, and of our Independence the one hundred and second year.

W'M H. BRADLEY, *Clerk.*

192 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Whereas in a certain suit in said circuit court between William R. Fosdick and James E. Fish, complainants, and the Chicago, Danville

and Vincennes Railroad Company et al., defendants, and the Hinkley Locomotive Works of Boston, Massachusetts, intervenor, which said suit was removed to the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided, a diminution of the record & proceedings of said cause has been suggested in this, to wit: 1st, an entire and perfect copy of the record in what may be termed the main case, not including, however, the testimony save as applicable to the intervenors, including, however, a list showing the amounts paid by order of court by consent through the receiver for supplies and other claims; and 2nd, a complete
192½ copy of the record in the case of Osgood vs. The C. D. and V. road, removed from the circuit court of Will County, down to and including the order directing the complainant to intervene in the case of Fosdick and Fish and showing the amount paid in that case through receivers for supplies.

You therefore are hereby commanded that, searching the records and proceedings in said cause, you certify to the said Supreme Court of the United States what omissions and errors you shall find, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States the fifth day of February, A. D. 1878.

[SEAL.] D. W. MIDDLETON,
Clerk Sup. Court U. S.

193 United States circuit court, northern district of Illinois.

WILLIAM R. FOSDICK ET AL.,
v.
CHICAGO, DANVILLE AND VINCENNES RAILROAD Company et al. } Bill.

CHARLES HESSE MICHAEL KELLEY, CHARLES L. English, William H. Sweitzer, Livingston T. Dickinson, First National Bank of Danville, Illinois, and Alvin Gilbert,
v.
CHICAGO, DANVILLE & VINCENNES RAILROAD Company. } Petition.

Exceptions taken by Stephen Osgood, Frederick W. Huidekoper, Thomas W. Shannon, John M. Denison, George W. Gill, Alonzo A. Sumner, Chandler Robbins, and William T. Hickok, intervening petitioners in the above-entitled cause to the petitions of Charles Hesse, Michael Kelley, Charles L. English, William H. Sweitzer, Livingston T. Dickinson, First National Bank of Danville, and Alvin Gilbert.

1st. That the said claims of the said petitioners as set forth in their several petitions filed herein are not liens upon the property of the Chicago, Danville and Vincennes Railroad Company.

2dly. That the same, if liens, are inferior to the lien of the deed
194 of trust for a foreclosure of which the above-entitled cause was instituted by William H. Fosdick and James D. Fish.

3rdly. That the said petitioners are not entitled to the relief prayed for in their said petitions.

The said exceptants therefore pray the court that the prayers of the said petitioners be denied.

CRAWFORD AND McCONNELL,
Solicitors for Intervening Petitioners.

(Endorsed:) Filed Sept. 27, '75. W'm H. Bradley, cl'k.

195 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the foregoing to be a true and correct copy of the exceptions filed by Mess'rs Crawford and McConnell, solicitors for Stephen Osgood, Frederick W. Huidekoper et al. to the allowance by the court of the claims then pending in said court on petitions of Charles Hesse, Michael Kelley, Charles L. English, W'm H. Sweitzer et al., in the said entitled cause of William R. Fosdick et al. against The Chicago, Danville and Vincennes Railroad Company et al., as the original of the same remains in my custody; and I further certify that this copy is detached and not made a part of a record this day certified in said entitled cause under a writ of certiorari from the Supreme Court of the United States, of the date of February 5, A. D. 1878, R. Biddle Roberts, esq., at whose instance the said writ of certiorari was issued out as aforesaid objecting to its incorporation in said record.

In testimony whereof I have hereunto set my hand and affixed
196 the seal of said court, at my office in Chicago, in said district, this 23rd day of February, A. D. 1878, and of our Independence the 102d year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 940. Frederick W. Huidekoper & al., appellants, vs. The Hinckley Locomotive Works. Certiorari and return. Filed 27th February, 1878.

Jany 9. 79. Argd A.C.H.S.

SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1877.

F. W. HUIDEKOPER, AND OTHERS,

vs.

THE HINCKLEY LOCOMOTIVE WORKS,
INTERVENOR.

Chancery.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS,
AND
BRIEF FOR APPELLANTS.

HENRY CRAWFORD,
Solicitor.

CHICAGO:
PRESS OF BEACH, BARNARD & CO., LEGAL PRINTERS, NO. 104 RANDOLPH STREET.

1878.

IN THE

United States Supreme Court,

OCTOBER TERM, A. D. 1877.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS.

FREDERIC W. HUIDEKOPER, AND OTHERS, APPELLANTS,
vs.
THE HINCKLEY LOCOMOTIVE WORKS, APPELLEE.
} Chancery.

STATEMENT OF CASE FOR APPELLANTS.

The Chicago Danville & Vincennes Railroad Company was incorporated by special charter from the State of Illinois, approved February 16, 1865. The act was declared to be a public one. It gave to the corporation perpetual succession, with authority to locate, construct and complete a line of railroad from Lawrence County, Illinois, upon the most eligible route, to and into the city of Chicago, by way of Paris and Danville. Its right of way was declared to be the fee simple property of the corporation.

Its borrowing powers were fixed as follows:

"SEC. 13. That the said railroad company, by this act incorporated, shall have power to borrow money on the credit of the company, not exceeding its authorized capital stock, at a rate of interest not exceeding ten per cent. per annum, payable semi-annually, and may execute bonds therefor with interest coupons thereto affixed, and secure the payment of the same by mortgage or deed of trust on the whole or any part of said railroad property and income of the company *then existing or thereafter to be acquired*, and may annex to said mortgage bonds the privilege of converting the same into the capital stock of said company, etc."

In execution of this power the railroad company on March 10, 1869, executed, acknowledged and delivered a mortgage or trust deed to William R. Fosdick and James D. Fish, as trustees, to secure the payment of $2,500,000 gold bonds. The bonds were declared on their face to be first mortgage bonds. The property covered by the mortgage and standing as their security was:

"All and singular the entire railroad of the party of the first part, lying, being and extending from its terminus in the city of Chicago, Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois and Vermillion, to the city of Danville, and thence southeasterly to a point on the State line of Indiana, joining and connecting at said point with the Evansville, Terre Haute, and Chicago Railroad, being in length about 140 miles, with all its franchises, equipments, property, tolls, issues and profits, and all its lands, tenements, buildings, fixtures, machinery, goods and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing and erections, and all its rights of way and easements, and all cars, engines and tools, and all rents, reservations and reversions of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire either in law or equity, of every kind whatever pertinent thereto."

An explicit covenant was contained in the mortgage that the corporation should execute conveyances by way of

further assurance for all property or rights thereafter to be acquired by it.

It was also agreed that on six months default of interest after presentment and demand, the principal of all the bonds should become immediately due and payable, and on demand of the holders of at least one-half the then outstanding bonds, the trustees should enter upon the actual possession and management of all the granted premises, receive all the income, issues and profits thereof, make sale of the mortgaged premises as an entirety, convey the same, and apply the proceeds, after deducting expenses of sale and management, to the payment of interest and principal of said bonds.

This mortgage, in March, 1869, was duly recorded in each of the counties into or through which the line of railroad was situate.

The entire amount of bonds provided for by the mortgage were negotiated by the corporation shortly after their date, and the road was constructed and put in operation.

On February 27, 1875, a bill was filed in the Circuit Court of the United States for the Northern District of Illinois, by the Trustees, Fosdick and Fish, against the railroad company, praying for a foreclosure of the above named first mortgage and a sale of the property.

The amended bill with its exhibits is part of the record on this appeal. It alleges the issue of the 2,500 bonds, the execution and record of the mortgage, a default in the payment of interest thereon on October 1, 1873, and continuously thereafter, the insolvency of the corporation, a demand of the holders of a majority of the bondholders to enforce their security, which is claimed to be a first lien on all the line of railroad and property of the company in existence at the date of instituting such proceedings.

A receiver of all the mortgaged property was appointed with the usual powers of management, who continued in

possession until the sale of the road, and its conveyance to the purchasers.

Pending the proceedings, the appellants, as representative bondholders were admitted as parties, to protect their interests and speed the cause.

The corporation answered, admitting the execution and record of the mortgage, and that it was a first lien on the property.

A final decree of foreclosure was enrolled in December, 1876. It finds the material averments of the bill to be true, and accordingly decrees that the said trust deed "was and still is *a first lien* upon all of the railroad, property, franchises and appurtenances in said deed of trust described," and orders the property to be sold by the master to pay the first mortgage debt of over $3,000,000, in gold. The railroad, together with its equipments, appurtenances and franchises was sold by the master on Feb. 7, 1877, to Frederick W. Huidekoper, Thomas W. Shannon and John M. Dennison, for the sum of $1,450,000. After confirmation the master conveyed the property to the purchasers by deed dated April 16, 1877.

Pending the litigation, the Hinckley Locomotive Works filed an intervening petition on Oct. 26, 1875, alleging in substance that it was a corporation of Massachusetts, engaged in the manufacture of engines.

In fall of 1873, it had sold to the railroad company five (5) engines, retaining title until full payment. Engines were delivered soon after purchase, but nothing had been paid when foreclosure suit was brought. The receiver had delivered up the engines. Their value was greatly diminished. The petition was referred to the Master with directions for him to "take evidence and fix the balance still due the Locomotive Works, for which the road is liable by virtue of said contracts, under the terms thereof."

The contracts for the purchase of the engines were both

in writing, one dated Sept. 1, 1873, the other Oct. 8, 1873. Their terms were identical, reciting that the engines were to be constructed for the railroad company—the purchase price to be evidenced by notes payable in four and five months, but the railroad company had the option of two renewals of four months each, practically giving a year's credit. The endorsements on the contract showed that renewal notes were in fact given, not maturing until July, 1875.

The contract provided that if the notes were not paid, the Locomotive Company might retake the engines, sell them, credit the price, and hold the company for the remainder.

The design of the petition was to force the payment of this alleged balance after disposing of the engines.

The Master made report Nov. 29, 1876. It found the purchase and delivery of the engines; that no payment had been made. They were re-delivered by the receiver in Sept., 1875, in an injured condition.

The precise amount due Locomotive Company under the contract cannot be definitely ascertained except on some theory of compromise, such as suggested by the receiver, that is to allow petitioner one-half the original contract price, less the amount realized on the resale. Accordingly, the Master recommends the allowance of $18,000 against the fund in Court.

On Dec. 14, 1876, the Court ordered the payment of $15,793.75 for use of and repairs to, locomotives.

The intervening bondholders moved, on affidavit, to vacate this order of payment, because the Court had no right to prefer this debt to the bonds. The Court refused, April 28, 1877, to vacate the order, and again directed the sum of $15,793,75 to be paid out of the fund.

The bondholders thereupon prayed an appeal which was allowed, and bond given and approved to operate as a supersedeas.

Errors Assigned by Appellants.

1. The decree of the court awarding payment for engines purchased or rented in the six months prior to the receivership, out of the sale proceeds, was contrary to law.

2. The title to the engines passed to the railroad company on delivery, and the property became subject at once to the lien of the first mortgage, because the written contract undertaking to reserve title in the vendor was not executed, acknowledged, or recorded as required by law.

3. The court erred in making the allowance to the petitioner out of the proceeds of the sale of the mortgaged premises, in preference to the payment of the bonds which were explicitly secured thereby.

4. The court erred in decreeing any title or relief to said petitioner based on such illegal and unrecorded contract.

ARGUMENT FOR APPELLANTS.

This appeal involves only questions of law. The facts are without controversy, and can be briefly stated.

A railroad corporation of Illinois executed a first mortgage upon all its property to secure an issue of bonds. The conveyance was in every respect valid. It was duly recorded in March, 1869, in all the counties in which the road was situate.

A fund is in the registry of the Circuit Court, arising exclusively from a sale of the railway under a foreclosure of that mortgage. The entire sale proceeds will pay less than half the amount decreed to be due on the bonds secured thereby.

An engine manufacturer, in 1873, sold engines to the railroad company. The contracts undertook to reserve a lien for the purchase money.

These contracts were never acknowledged or recorded.

The engines were all delivered to the company, remained in its continued possession and use, then passed into the custody of the receiver after suit brought.

On these facts, the bondholders and their trustees, relying on the priority of their recorded mortgage of 1869, claimed that their lien bound the engines from their delivery, and the entire proceeds of the sale ought therefore to be distributed to the holders of bonds secured by that conveyance, in preference to any other creditors.

At the circuit the engine company defeated the priority claimed for the mortgage bonds and recovered out of the sale proceeds $15,793.75 on the purchase price of the engines within the six months prior to the foreclosure suit.

Whether the eminent equity judge who pronounced these rulings has correctly apprehended and enforced the respective rights of the bond and other creditors upon the fund in court, is to be resolved upon this appeal.

The errors which underlie the decree may be fully considered under two propositions.

I.

EVEN IF IT SHOULD BE DECIDED THAT THE TITLE TO THE ENGINES HAS ALWAYS BEEN IN THE LOCOMOTIVE COMPANY, THE CIRCUIT COURT HAD NO LAWFUL POWER TO DEFEAT THE FIRST MORTGAGE SECURITY, BY APPROPRIATING ANY PART OF THE PROCEEDS OF SALE TO PAY AN ENGINE PURCHASE LIABILITY, INCURRED BY THE MORTGAGOR CORPORATION, YEARS AFTER THE LIEN OF THE MORTGAGE HAD BECOME FIXED AND PARAMOUNT.

The Circuit Court, in ordering payment of the $15,793.75, must obviously have proceeded upon the theory that the ownership of the engines was in petitioner. It will be

argued hereafter that the title was not in it as against the mortgagees. At present it will be contended that, even on the chosen theory of the court below, the recoveries against the fund ought to be reversed, because it can be demonstrated they are contrary to well established principles of law, and founded in violation of an express statute which determines the rights of the contestants.

The validity, character, or amount of petitioner's claim as *against the corporation*, are not involved in this controversy. Neither is this a contention over the distribution of net income realized from the working of the railway by the receiver. The precise question is—can a fund arising exclusively from a foreclosure sale, although grossly inadequate to pay the mortgage debt, be legally seized upon, by a court of equity and appropriated to the payment in full of an open debt of the mortgagor, which had been incurred years after the record of an encumbrance, specifically charging the property sold?

This judicial action in decreeing that the debt last created should be first in the order of payment, must obviously be justified on the theory that the car debt constituted a preferential charge, either on general legal principles or by virtue of some positive statute, or because a court of chancery in the foreclosure of a railway mortgage is vested with a peculiar discretionary jurisdiction to enforce the payment of liabilities incurred for labor and supplies purchased for or used in the operation of the road.

On any of these grounds the decree is wholly indefensible.

1. If the rights of the contestants are to be tested by those legal principles which have so uniformly established and protected the estate of mortgagees under the registry laws, the result would plainly reverse the decree.

The lien of appellants' mortgage became effective in March, 1869, by its record. Indeed the Court decrees it a first lien.

The elementary doctrine underlying the recording acts is, that any creditor claiming under a contract relating to the mortgaged estate made after the record of the encumbrance and without privity of the mortgagee must hold his rights subject in all things to the prior mortgage.

Rogers v. *Humphreys*, 4 Ad. & El., 299.
Haven v. *Adams*, 4 Allen, 80.
Crosby v. *Harlow*, 21 Maine, 499.
Ellis v. *B. H. & E. R. R.*, 107 Mass., 1.

The Statute of Illinois is express :

"The record of all such deeds, mortgages or other instruments in writing so acknowledged as aforesaid shall be taken, and the same is hereby declared to be good and effectual in law, to charge any purchaser, mortgagee or creditor with notice of the existence of such deed, mortgage or other instrument in writing from and after the time when such deed, mortgage or other instrument was actually filed for record in the proper office."

Gross' Stat., Chap. 24, § 19.

The judicial construction of this act has with unvarying strictness charged subsequent creditors with full notice of the rights of the first recorded lienor and ruled that it was impossible for them to acquire any greater estate or equities in the encumbered estate than was possessed by the mortgagor.

Warner v. *Helen*, 1 Gilm., 220.
Kruse v. *Scripps*, 11 Ill., 98.

This principle subordinates all later engagements of the mortgagor, whether by alienation, judgment, lien, lease, or executory contract of any kind.

In the absence of some restrictive statute in force when the first mortgage is executed and recorded, the rule is of universal application that all later liens, whether by express contract or arising by operation of law, are restricted in their operation and enforcement to the residuary interest

of the owner after full satisfaction of the elder encumbrance of record.

Judson v. *Stephens*, 75 Ill., 257.
McCarty v. *Carter*, 49 Ill., 53.

In those States where by express legislative enactment a lien is given to mechanics for labor or material furnished for the improvement of premises, the rule of priority is unchanged.

The statutory lien is judicially treated as an *in invitam* hypothecation of the land, effected on the day when the work is begun or materials delivered.

If such date is subsequent to a duly recorded incumbrance, the mechanic accepts his statutory lien with full notice, and therefore he can neither recoup the improvements incorporated in the mortgaged premises, nor have his claim preferred to the mortgage.

The action of the lower court distinctly repudiates this most essential principle, and is contrary to all the authorities.

The Supreme Court of Tennessee thus states the true rule of priority between the mortgagee and a subsequent improver of the premises:

"Nor is the mortgagee bound to concur in making repairs, or liable in any sense for the expense without his consent. The case then results in this: that repairs were made at the request of the mortgagor, and upon his credit. The mechanic was also entitled to a lien on the mortgagor's interest in the land as a security for the payment. But as there was a prior lien of which the mechanic had notice, and as the interest of the mortgagor is subject to that lien, the mechanic could acquire no greater or higher interest by his contract with the mortgagor than that which the mortgagor possessed. The mechanic knew, or might have known, of the existence of the prior lien, and has no cause to complain that it is entitled to priority of payment. Under a different rule it would be in the power of the mortgagor to destroy the security by erecting costly improvements, the expense of which the estate im-

proved could not be able to pay; and therefore the mortgagee is entitled to priority of payment over the lien of the mechanic for work done after notice of the existence of the prior lien, and the registry of the mortgage is such notice."

Reed v. *Bank of Tenn.*, 1 Sneed, 262.

In a case where priority was claimed on the improvements only, the court said:

"Conceding counsel to be correct in saying that the lien on the building is absolute, still we do not think that the position that it is prior to that of a previously existing encumbrance upon the land can be maintained. At no time can the lien of the mechanic be said to reach back and cut off that of a prior mortgage or other previous encumbrance."

Jesup v. *Stone*, 13 Wis., 466.

"According to the universal interpretation of such statutes, the mortgagor, while in possession, may bind his interest in the premises, but he has no power to prejudice the estate of the mortgagee without his consent."

Otley v. *Haviland*, 36 Miss., 19.

The Supreme Court of California declined to discuss the subject, saying:

"It is useless for us to adduce any argument in support of the proposition that a mortgage of land carries with it all buildings which are or may be attached to the freehold, and that the rights of the mortgagee cannot be defeated by mechanics' liens, or other encumbrances created without his consent."

Prior v. *Murrie*, 4 Cal., 175.

This court, in a very early case, enforced the same principle.

"The claim, therefore, of the purchaser with notice, to have the value of the improvements which may have been made from the fruits of the property itself, deducted from the price at which the property was sold, seems to the court too unreasonable to admit of a serious argument in its support. No case was cited, nor has this court met with one which affords it the slightest countenance. We must, therefore, overrule this objection."

Hughes v. *Edwards*, 9 Wheat., 500.

Since followed in

Minn. Co. v. *St. Paul Co.*, 2 Wall., 609.
Butt v. *Ellett*, 19 Wall., 544.

A vigorous statement of the rule, and the reasons justifying it, is made by the Supreme Court of Iowa:

"In the case of a mortgage upon land and the buildings thereon before the mechanics' lien attached, the mortgagee will hold the property as against the mechanic.

"How is it when improvements in the nature of additions or repairs to the building are made after such mortgage?

"The mortgage binds the house; the improvements of the character indicated become a part of the house, and are, as it were, incorporated with it. After the improvements are made, they do not remain separate and distinct from the building. They have lost their distinctive character. The house includes them; they are a part of it, and as such are covered by the mortgage. For the reason that the mortgage binds the improvements as a part of the house, the mechanics' lien cannot defeat the mortgagee's rights.

"These views, we think, are based upon sound principles, and lead to equitable results. Should contrary doctrine prevail, it would be within the power of a mortgagor to ruin the security of his creditor, by making improvements upon the building covered by the mortgage, which in fact and in law, would be but part of the building itself. The case before us serves to illustrate the injustice of such a rule. The mechanic or material man cannot complain. He had notice of the mortgage, and knew, or was bound to know, the purposes for which the materials were furnished or work was done by him."

Getchell v. *Allen*, 34 Iowa, 562.

In Illinois, the highest court has had frequent occasion to construe these lien laws.

It has declared certain fixed principles of their interpretation.

That the lien is acquired at the date when the work or material is furnished.

Smith v. *Hughes*, 24 Ill., 270.

The governing principles upon which priority of lien must be based, is that the vested rights of purchasers or encumbrancers, cannot in any manner or to any degree be affected or displaced when once attached, by any rights subsequently accruing to mechanics.

Williams v. *Chapman*, 17 Ill., 423.
McLagan v. *Brown*, 11 Ill., 519.

In case of an ordinary foreclosure, it would doubtless be conceded that the principles thus explicitly announced would be controlling, and that the Circuit Court would have no rightful power to invade and annul the clearly defined statutory priority of the bondholders by devoting any part of their distributive share of the sale proceeds to the payment of any junior liability or contract of the mortgagor.

The only claim to emancipate this decree from the control of these ordinary rules applicable to real estate mortgages, must be based upon the theory that mortgages upon railways are exceptional in their character.

This is no longer an open question.

The legislature gave this corporation power to "mortgage" its property to secure bonds. That power, granted to the artificial person, had a fixed and definite meaning in the law.

The mortgage, as to its execution, acknowledgment and record, was left to the operation of those laws and statutes which are applicable to mortgages made by natural persons.

On default they are enforcible by chancery, and the rights of the creditors secured thereby are to be protected by the same legal principles as to registry and priority which preserve the vested rights of other mortgagees.

To this the authorities are express.

The attempt to effect a distinction operating to the prejudice of the mortgage bondholders of a railway, was most

distinctly repudiated by this Court at a very early period in the history of this class of securities.

"Conceding the general rules of law to be as here laid down, still an attempt is made by the respondents, to maintain that railroad mortgages made to secure the payment of bonds issued for the purpose of realizing means with which to construct the road, stand upon a different footing from the ordinary mortgages to which such general rules of law are usually applied.

"Authorities are cited which seem to favor the supposed distinction, and the argument in support of it was enforced at the bar with great power of illustration, but, suffice it to say, that in the view of this Court the argument is not sound, and we think that the weight of judicial determination is greatly the other way."

The Supreme Court of Illinois, in construing a similar railway mortgage, used the following language:

"The charter of this road authorized it to issue bonds, and secure the payment of the same by mortgage, or deed of trust, on the whole or any part of the road, property and income of the company, then existing or thereafter to be acquired.

"Nowhere do we find any provision made as to the mode of acknowledging or recording these mortgages, or of the effect they shall have upon the rights of subsequent purchasers or creditors. This seems to have been left, by the legislature, to be influenced and controlled by the general law of the State on the subject.

"Where the charter, or a general law of the State, authorizes a railroad company to mortgage either its real or personal estate, and provides no mode of execution or recording, and specifies no form for the instrument, and declares no effect which it shall have upon the rights of the parties, or others, it would seem to follow necessarily, that such mortgages must be subject to and governed by the general laws of the State regulating mortgages; at least so far as the general laws are applicable to the subject matter of the mortgage.

"The trustees took possession as mortgagees, for condition broken, in pursuance of their right distinctly expressed in the trust deed, and the duties of mortgagees in possession are imposed upon them not only by the law, but by the special provisions of the trust deeds and the deed of

possession, and these rights and duties are very different from those of an assignee of a failing debtor for the benefit of his creditors. The former are not bound to know, and indeed have no right to know, that there are any debts except the mortgage debt, and when that is paid they must surrender all the residuum to the debtor."

Palmer v. *Forbes*, 23 Ill., 248.

Dunham v. *Railway Co.*, 1 Wall., 268.

Instead, therefore, of a lax construction of such conveyances, tending to a diminution of the estates and priorities of mortgages as ordinarily understood, the consistent practice of the Courts has been to impress upon them a liberal interpretation, and so amplify usual equity remedies as to most thoroughly enforce the security.

The bondholders' right upon the fund is determined by their lien upon the property whose sale produced it.

Their lien became vested in April, 1869, upon the entire railroad and its appurtenances.

Petitioner's claim arising years later is clearly subordinate, and consequently not entitled to any share of the fund until full payment of the bonds.

That such are the rights of the litigants according to fundamental principles, cannot admit of serious challenge.

Usual precedents, therefore, convict the decree below of palpable error, in displacing the priority of the recorded lien.

2. It is equally true that no warrant can be found in any legislation of Illinois for the decree giving preference to the engine manufacturer.

A railway being *quasi* public work, owned and operated by an artificial person, having only such capacity as the legislature chooses to grant, it is usual, by express statute, to vest borrowing powers and authority to create even an express contract lien.

In the absence of clear and positive enactment, it has been ruled that a railroad company cannot create a statu-

tory charge upon its line of road by incurring a liability for improvements.

Dunn v. *North Mo. R. R.*, 24 Mo., 493.
McAuley v. *West Vt. R. R.*, 33 Vt., 323.

The general mechanics' lein law of Illinois does not, either in terms or by implication, embrace claims for labor or material furnished to a railway either for the construction, improvement or operation of the road.

The only statute purporting to cover this class of liabilities and authorize a lien upon railroads, is an act passed and in force July 1, 1872, as follows:

"All persons who may have furnished or shall hereafter furnish to any railroad corporation now existing or hereafter to be organized under the laws of this State, any fuel, ties, material, supplies, or any other article or thing necessary for the construction, maintenance, operation or repair of such roads by contract with said corporation; or who shall have done or performed, or shall hereafter do and perform any work or labor for such construction, maintenance, operation or repair by like contract, shall be entitled to be paid for the same as part of the current expenses of said road, and in order to secure the same, shall have a lien upon all the property, real, personal and mixed of said railroad corporation, as against such railroad and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles or the commencement of said work or labor, provided suit shall be commenced within six months after such contractor or laborer shall have completed his contract with said railroad corporation, or after such labor shall have been performed or material furnished."

Rev. Stat., Ill., (1874,) p. 671, § 51.

The statute embraces *inter alia* fuel, ties, material, supplies, or any other article or thing necessary for the operation of such road.

It is not the purpose to claim any narrow construction of the act as to the class of claims included in it. Engines are necessary for the operation of a railroad; should

an owner of engines, by an unequivocal contract of rental lease his equipment to an Illinois railroad corporation, it might under a fair construction of the law, be considered furnishing a supply or other article or thing necessary for the operation of the road, and therefore the liability might be entitled to the precise rights and remedies of the statute.

The nature and extent of this statutory right, and especially when invoked as against prior and fixed encumbrances, is not a matter of doubtful construction.

In determining whether a reading is to be put upon a lien law that would overreach prior encumbrances, very strict canons of construction are adopted by the courts.

In the case of *Morgan* v. *Cincinnati*, 3 Wall., 275, where the attempt was made to impress upon an advance of money by a city to a railroad company, a statutory charge paramount to the mortgages, this court said:

"It is insisted it was not only a charge, but a charge prior to the first mortgage, in effect overriding all liens and postponing them. Certainly a statute that can have such a peculiar and strikingly inequitable effect and operation, should be very explicit and positive in order to obtain the assent of a court of law or equity."

And later:

"Mortgagees and others acquiring interest in property against which such a lien is sought to be enforced, have a right, therefore, to call for strict proof of all that is essential to the creation of the lien."

Davis v. *Alvord*, 4 Otto, 545.

In discussing the effect to be given this class of legislation, creating a charge upon land unknown to the common law, the Supreme Court of Illinois designate it as a statute opposed to common right, to be strictly construed, and in no case extended beyond its terms.

Cook v. *Heald*, 21 Ill., 425.
Brady v. *Anderson*, 24 Ill., 112.
Stephens v. *Holmes*, 64 Ill., 336.

This construction given to the local statute by the highest judicial authority of the State, is as controlling on the Federal Courts as though it constituted the text of the statute.

Leffingwell v. *Warren*, 2 Black., 599.
Nichols v. *Levy*, 5 Wall., 433.
R. R. Tax Cases, 2 Otto, 575.

It will be seen upon examination that the plain letter of the statute, instead of displacing prior liens to any extent whatever, has been cautiously framed to protect them, in precise harmony to the correct principles which have been noted.

The lien created by the statute is most explicitly defined and bounded.

The charge is "upon all the property, real, personal and mixed, of said railroad corporation, as against such railroad, *and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles*," *etc.*

Mortgages or other liens which accrued *before* the commencement of the delivery of such articles, are left wholly untouched by this statute. Their priorities already assured by the registry laws, were further designed to be protected by express legislation, and as against them the material man has under this statute no lien whatever. His only claim under the law will be to take his incumbrance as of the date when his supplies were first delivered, and if any surplus is left after full payment of the precedent mortgages, to assert his claim upon that, as against the liens which accured after his lien had become vested.

Two recent cases in this Court illustrate the cardinal feature of such enactments:

In *Davis* v. *Bilsland*, 18 Wall., 661, and *Fox* v. *Seal*, 22 Wall., 437, this Court postponed mortgages to mechanics' liens, exclusively upon the ground that by the statutes of the State the lien thereby created for improvements upon

realty, was explicitly fixed "at the date of the commence-" ment of the work." In the cases then under discussion, the mortgages had been executed after the mechanic had begun work, and the mortgagees had therefore actual notice of the existence of the prior statutory lien.

In this case the conditions are exactly reversed.

The first mortgage which the Circuit Court displaced by this decree did not accrue after, but years before, the sale of the engines, or their delivery to the company.

By the clear language of the only law which could create any lien whatever, it is declared that against such a prior mortgage the statutory charge was wholly inoperative.

If petitioner had, in apt time, instituted an equitable action in its own name, to enforce a statutory lien on the railroad property by reason of its claim for engine purchase, it could only have obtained a decree limited to the company title, and that of such mortgages as had accrued after the date of beginning the delivery of the engines.

The statute would distinctly prohibit the court from disturbing the earlier encumbrances.

Surely the rights of a lienor cannot be amplified, because it seeks to enforce them as an intervenor in a foreclosure case, instead of as an original complainant.

If, therefore, appeal is made to the statutes of Illinois to support the claim below, it suffices to answer. The act is definite, free from all ambiguity, and capable of but one interpretation. A lien upon railway property is given for supplies or material used in operating the road. It is, however, limited in its character. The statute declares it shall have no operation against prior incumbrances; such limitation is in full accord with ordinary legal principles, Applying the statutory limitation to the petitioner's claim, the mortgage bonds ought not to have been postponed, but should have enjoyed the whole fund.

Other tests will reverse the decree.

The character of the engine contract, as to the period of credit extended to the corporation, and the date of instituting legal proceedings by petitioner to enforce its claim, did not authorize the court to decree any statutory lien whatever.

The law only fixes the lien "provided suit shall be commenced within six months after such material shall have "been furnished."

The engines were all delivered to the company in 1873. Suit to foreclose the mortgage was instituted in February, 1875. The petition to enforce the claim was filed by petitioner October 28, 1873, over two years after the engine deliveries were made. This was "the commencement of suit" to enforce its claim of lien. The bar of the statute was complete. After the lapse of six months the statutory charge became utterly extinct, incapable of any judicial enforcement, and the court possessed no power whatever to revive a lien which the statute had declared should no longer exist. The limitation on such claims is matter of substance, and if the action is not instituted within the statutory period, no right at all can be decreed under it at a later date.

Green v. *Jackson Water Co.*, 10 Cal., 374.
Green v. *Ely*, 2 G. Green, 508.
Lunt v. *Stephens*, 75 Ill., 512.
Arbuckle v. *Ill. Midland Ry.*, 81 Ill., 431.

The written contract shows clearly that it was never in the contemplation of the parties that resort should be had to a statutory lien.

The rule is well settled, in the interpretation of such laws, that when a mechanic chooses to give so extended a credit that the final payment does not mature until after the time when a lien must be enforced by legal action, he will be deemed to have voluntarily waived his lien, and

relied on the personal security of the party to whom the credit was given.

Phillips on Mech. Liens, § 281.

Says the Supreme Court of Kentucky on this point:

"It was obviously the intention of the Legislature to limit the duration of the lien, and to require its assertion by suit within the time prescribed. If no suit be brought within the year, the lien given by the statute is lost, there being no other mode allowed for its enforcement. The necessary consequence would seem to be that if a party places himself in a position which renders him unable to bring a suit to enforce the lien within the time limited, he thereby virtually renounces it, having deprived himself by his own voluntary act of the right to enforce it."

Pryor v. *White*, 16 B. Mon., 605.

The engine contract was originally on twelve months' credit, but that had been extended for nearly twelve months more.

The credit granted by the notes is utterly inconsistent with the idea of a statutory lien, the indispensable pre-requisite of which is that it must be enforced, if at all, by suit brought within six months from the delivery of the material.

Judged by the statute, therefore, the petitioner had no priority over the mortgage bonds of 1869, because its inchoate statutory lien for material furnished is expressly subordinated to the senior mortgage.

The credit given by the contract extended a year and a half beyond the time within which the lien must be enforced by suit.

The petition filed Oct. 28, 1875, to establish the lien was expressly barred by the statutory limitation of six months.

3. If the Circuit Court had no power, according to the ordinary legal principles applicable to mortgages, or under any statute, to divest or postpone the recorded lien of the first mortgage, the inquiry remains, whether the Chancellor

is vested with some exceptional jurisdiction to decree a preference to the operating debts of a railroad corporation before the mortgage lien is recognized.

The attempt will, without doubt, be made to sustain the decrees upon some such theory.

It will be urged that equity constrains a Chancellor to liquidate the corporate liabilities necessarily incurred in operating the railway; that they are in effect expenditures for the benefit of the mortgagee's security, which a Court of Chancery at its discretion can decree shall, be paid out of the property in its custody in preference to the bonds.

Under cover of such specious appeals to what are designated the " principles of natural equity," this class of junior claims have in many recent cases of railway foreclosures, secured judicial recognition to such an extent that the value of the bondholders' security has been most seriously damaged and in some instances been threatened with practical extinction.

The result is accomplished in this manner. A railroad company makes default on its first mortgage bonds. It is insolvent, the security is inadequate, and there is a large accumulation of debt for labor and supplies.

Suit to foreclose is instituted and a receiver appointed. Intervention is, thereupon,made by a legion of floating creditors. The appeals of this necessitous and clamorous class address themselves to the sympathy rather than the judgment of the Chancellor.

Yielding to the promptings of this sentimental equity, orders are entered on the petitions of the ordinary creditors, requiring the receiver to apply the net income of the road to their payment, and if the receiver's earnings be inadequate, it is ordered that the sale proceeds arising under the final decree of foreclosure shall be applied to their full payment before the mortgage debt.

The bondholders have then no recourse but to appeal,

supersede the decree, and suffer the damage consequent on the postponement of the re-organization of the property for several years, or incur the heavy expense of protecting their security by raising the large sum of money necessary to clear off the allowances decreed on the junior claims. This generally embraces all labor and supply debts of the railroad company incurred in the six months anterior to the institution of the foreclosure suit, frequently aggregating several hundred thousand dollars.

It is not possible to conceive of a more dangerous judicial heresy.

In the interest of the large values invested in this class of negotiable securities, it is highly necessary that this Court of last resort should authoritatively decide whether the Circuit Courts of the United States, in the absence of express legislative support, do in fact possess a roving commission to invade in such manner a security definitely fixed by law, and effect a confiscation of the vested rights of bondholders.

As a substantive proposition, it would be a most amazing paradox to claim for a court of equity the power to create a lien upon property. Such authority was never asserted to be properly referable to the domain of what is termed the discretionary jurisdiction of chancery.

Liens are created either by express contract of the parties or arise by operation of some statute. The function of a Court of Chancery is to enforce such. There its jurisdiction ends. It has no creative power whatever. The mere fact that a claim presented is in conformity with the principles of natural justice and equity is not sufficient to authorize such arbitrary exercise of jurisdiction.

Howe v. Shephred, 2 Sumner, 409.

Hardships create no equities.

Even the performance of a benefit to realty by the erection of valuable and permanent improvements will not

vest any power whatever in a Court of Chancery to decree the debt to be a fixed charge upon the land improved.

Independently of statute no equitable principles exist which can aid the mechanic. The whole system of such liens is artificial. It derives its existence and efficacy from positive legislation, and not by reason of any natural equity.

The whole doctrine was summed up by Field, J., in delivering the opinion of the Court, in *Ellison* v. *Jackson Water Co.*, 12 Cal., 554.

"The plaintiff cannot, therefore, maintain the lien he asserts under the statute, and outside of the statute there is no lien which can be enforced. Equity raises no lien in relation to real estate, except that of a vendor for purchase money."

Spencer v. *Barnett*, 35 N. Y., 94.
McNeil v. *Borland*, 23 Cal., 144.
McCoy v. *Quick*, 30 Wis., 521.

Says the Supreme Court of Illinois: "It is a mistake to suppose that the Court creates or confers the lien by its decree. The Court only finds and declares that it was in existence. It has no more vigor as a lien after than before the decree."

Clark v. *Moore*, 64 Ill., 275.
Croskey v. *N. W. M. Co.*, 48 Ill., 480.

As a logical result of the proposition, that the lien is purely statutory, arose the doctrine of strict construction.

"The lien as given by statute is in derogation of the common law, is secret in its nature, no notice being required by record or otherwise, either to creditors or purchasers, and it should, therefore, receive a strict construction. This lien, like all others of the same character, should be fairly enforced when the party brings himself within the provisions of the statute, but it should not be extended to cases falling within the reason, but not provided for by the language, of the statute."

Brady v. *Anderson*, 24 Ill., 112.

Stephens v. *Holmes*, 64 Ill., 336.
Rothgerber v. *Dupy*, 64 Ill., 452.

When attempt was made to induce the Supreme Court of Illinois to enforce a lien not warranted by the statute, it was answered :

" We are forbidden to bring cases within it which the legislature have not included. Should we do so, we would be justly chargeable with judicial legislation. It is far better to leave omitted cases to the future action of the same power that enacts the law.

" We can see no justice or propriety in extending the law by liberal construction, which is partial in its operation, designed to benefit one class of the community over all others, and opposed to common right, *so as to create mortgages and secret liens in cases where the legislature have not said they should exist. We further say we have no right to create a lien when the statute has not.*"

Phillips v. *Stone*, 25 Ill., 80.
Cook v. *Heald*, 21 Ill., 425.

In treating of the nature of equitable jurisdiction invoked to enforce this species of liens, this Court ruled:

" The jurisdiction of the Court rests on the statute, and can extend no further."

Canal Co. v. *Gordon*, 6 Wall.

The system of erecting the debt created for the improvement of land into a specific charge upon the property benefited, is utterly unknown in England.

It has never been claimed that the English High Court of Chancery possessed the power on any exceptional equitable considerations, to supply the want of a parliamentary act, by creating and enforcing a lien by its decree.

The Circuit Courts of the United States can exercise no equity powers except those conferred by Congress, and those judicial powers which the English High Court of Chancery, acting in its judicial capacity as a Court of Equity, possessed and exercised at the time of the formation of the Constitution.

Fountain v. *Ravenal*, 17 How., 384.

If no instance can be cited from the whole range of English Chancery precedents when equity undertook to enforce a lien created neither by contract nor legislation, we can certainly conclude that the exercise of such a power by the Federal Courts is wholly extra-judicial.

Such is the well established limitation restraining the power of Chancery even as between the land owner and an improver. The illegitimate and dangerous character of the jurisdiction exercised in the decree in this cause can only be thoroughly appreciated, when it is considered that it not only assumes to create a lien as against the owner, but to enforce it to the injury of prior recorded encumbrances, contrary to every principle which distinguishes equity jurisprudence, repudiating the prohibition of express statute and the unequivocal commands of repeated precedents which it had no right to disobey.

The elementary principles of equity forbid such jostling of priorities as was attempted by this decree.

1. A Court of Chancery takes no note of special considerations attending the creation of debt.

All liabilities founded in good faith on valuable and adequate consideration, are equally meritorious in a Court of Chancery. The money loaned on bonds to originally construct and equip a railroad is entitled to equal favor with the claim of the laborer and material man who contribute to its later operation.

If, therefore, the debt upon the bonds was created years prior to the furnishing of supplies, and was first enforced by suit and sequestration of the property, the maxim, who is first in time is strongest in right, would require the payment of the bonds in preference to the material debts. The bondholders' right was a fixed legal one. Prior legal rights cannot be made to yield to later chance equities. To deprive a party of the priority given him by contract or statute, it must be against conscience for him to enjoy it.

2. But the statute fixed the right of the bondholder as a legal lien upon the property as of the date of record in March, 1869. As equity abhors secret liens, it would be a marvelous contradiction to postpone a recorded lien of five years' standing to a mere debt of recent creation, having no security attending it. It is the doctrine of equity that a party will not be relieved from the obvious consequences of his own contracts if he has failed to exercise common prudence. By the statute petitioner was bound to take notice of the recorded mortgage, and entering into a later engagement with the mortgagor, he deliberately subordinated himself to the prior lien. Equity in such cases follows the law and has no power to place the last creditor in a better position than he voluntarily accepted, having full knowledge of all the facts. Chancery never overthrows a valid legal estate.

3. The charter of this railroad company authorized it to execute a mortgage of all its property then existing or thereafter to be acquired. *Ex vi terminorum*, this implied the security was to be paramount, continuous and effectual according to the known rules and usages of law. It contemplated no such absurdity as a mortgage security which the creditor had no absolute and complete right to enforce on default, but which might be attenuated and destroyed at a Chancellor's discretion, transforming it from a first lien into a refuse security, entitled only to such residuum of the property covered as might be graciously left it after the full satisfaction of later sentimental equities.

This trust mortgage actually conveyed the legal title of the property to the trustees. Upon the occurrence of a default on the bonds, they were empowered and required to take actual possession of the entire railroad, its equipments and appendages, sell and convey the same. It was declared that the deed on the execution of this power

should be a bar to the corporation, and all claiming under or through it subsequent to the date of the mortgage.

This power of sale is part of the security on which the creditor has a right to rely, and which a Court of Equity must respect and enforce on the occurrence of the specified default.

Hall v. *Sullivan R. R.*, 21 Law Rep., 138.
Shaw v. *Norf. Co. R. R.*, 5 Gray, 162.
Am. Bridge Co. v. *Heidelbach*, 4 Otto, 800.

When made, the conveyance under the power takes effect by relation to the date of the creation of the power.

It is the function of a Court of Chancery to enforce this right of entry and sale by its process, thus accomplishing the specific performance of the contract.

Gilman v. *Ill. & Miss. Tel. Co.*, 1 Otto, 616.
Dows v. *Mueller*, 4 Otto, 444.

The mortgage contract covenants, that in the event of a sale, the entire proceeds, after expenses, shall be devoted to the payment of the bonded debt.

It would be a palpable breach of trust if the mortgage trustees, in the event of a sale by them, should apply any of the proceeds to the payment of any of the other debts of the corporation.

In the case of a judicial foreclosure the Court constitutes itself the substituted trustee to effectuate the security of the bondholders. They have the undoubted right, therefore, to insist that the distribution of the sale proceeds by the court shall be precisely that provided for by the trust deed in case of a non-judicial sale. Surely it is not competent for a court of equity to dispose of trust property in a manner which would constitute such a clear breach of trust by the designated trustee, as to authorize an injunction to restrain the diversion. Equity can no more commit a lawful breach of trust than can an individual. The Court has no

more right in a foreclosure case to prefer a subsequent debt of the mortgagor than the trustees would have.

It is matter of express and repeated decision by this and other courts that the appointment of a receiver in such cases is equivalent to an entry by the mortgagees, and that thereafter the income of the property would be theirs.

Am. Bridge Co. v. *Heidelback*, 4 Otto, 800.
Gilman v. *Ill. & Miss. Tel. Co.*, 1 Otto, 616.
Galveston R. R. v. *Cowdrey*, 11 Wall., 482.
Noyes v. *Rich*, 52 Maine, 116.
Boyd v. *Burke*, 8 Irish Eq., 660.
Howell v. *Ripley*, 10 Paige, 43.
Ellis v. *B. H. & E. R. R.*, 107 Mass., 1.

To acknowledge this principle as to the income, and yet claim that the Court holding the mortgaged estate *in custodia legis* can legitimately appropriate the proceeds of their sale to the liquidation of liabilities other than the bonds, is inconsistent and absurd.

The right to the income is necessarily based on the right to the property itself. There cannot be one scale of distribution for the net income and a different for the sale proceeds. The bondholders are entitled to both income and proceeds until they are fully paid. Subsequent creditors can only look to the surplus.

4. The statute which assumes to impress the quality of a lien upon corporate indebtedness for labor and supplies used in operating the railroad, was enacted in 1872.

The mortgage executed three years prior thereto, as to its extent, interpretation and remedies, is to be judged by the laws in force when it was executed.

Neither the charter nor the general conveyancing laws of Illinois then in force, nor the mortgage itself, furnished any notice to the purchaser of the bonds that there was any reserved power anywhere, either in the State or the

corporation, or the courts, to repudiate or alter the specific nature or priority of the obligation then created.

The ability of the corporation to negotiate its bonds to advantage depended largely—it might be said, altogether—on the inviolable character of the security which was incident to them.

If it had been clearly expressed in the mortgage that by subsequent legislation the company could be endowed with power to create a liability to be preferred to the bonds, the latter would necessarily have been regarded as practically unsecured. They would have commanded little value.

If it is now to be claimed that without any such expressed reservation either in the charter, or laws, or conveyance, the mortgagor corporation may, without consent of the mortgagees, create debts to supersede those specified in the mortgage, then it is obvious that the chartered grant to execute a mortgage was fraudulent, and the bonds have received fictitious credit. It is plain that the subsequent legislation of 1872 cannot be invoked to impair the obligation of the mortgage contract lawfully executed and recorded in 1869.

Yet under this subsequent statute, or by analogy thereto, it will be claimed this decree is justified.

It undertakes to withdraw from the mortgage some of the property. To that extent it dissolves and annihilates the lien, and impairs the obligation of the contract, and diminishes the value of the security.

Under the constitution, the State was wholly incapacitated from confiscating the bondholders' security by any legislation subsequent to the execution of the mortgage.

Wab. & Erie Canal v. *Beers*, 2 Black., 448.
Hawthorne v. *Calef*, 2 Wall., 10.
Von Hoffman v. *Quincy*, 4 Wall., 535.

If the State had no capacity by a solemn act of legislation to accomplish such result, the courts of the State were

equally powerless to repudiate the binding obligation of the contract as tested by the laws in force when it was made.

The mischievous and destroying power denied to the legislative and judicial departments of the State government can hardly be found to exist in our system of federal jurisprudence.

In a kindred attempt to diminish the security of a judgment creditor, this court observes:

"But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property, which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is, in effect, taking one person's property and giving it to another without compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact."

Gunn v. *Barry*, 15 Wall., 622.

The Circuit Court had no more legitimate authority to take a portion of the mortgage security and devote it to subsequent corporate creditors, on any theory whatever, than to order it paid over to the corporation itself, and then let it pay its own floating debts.

In either event, it is taking the mortgagee's property against his consent; or decreeing that there is a reserved, secret, and repugnant power in the mortgage or the law, which enables the debtor, at his pleasure and without limit, to supersede the earliest security by the creation of subsequent debt — in substance, to re-take the estate without payment of the debt for which it was lawfully and distinctly pledged.

It has been well observed that such a decision "is calculated to overthrow the very foundation of contract rights, and virtually to destroy all securities in the form of liens upon property, and to convert an intended benefit attempted to be secured by solemn contract, of which the world had notice, into a positive disadvantage, and to make

the lack of an attempt to provide a contract for security, the very best possible security, through a supposed discretion of the Chancellor.

"The appellants accepted a security; the law attached certain incidents and priorities to that security. The later creditors had no security. Crash comes, and the party attempted to be secured is postponed until the creditor who has no lien is paid in full out of the property mortgaged to the other."

COFER, J. in *Douglass* v. *Cline*, 3 Cent. L. J., 659.

5. The debts created in operating the road after the mortgage may be meritorious as against the corporation. So are all liabilities resting on *bona fide* adequate consideration.

Equitable preferences do not arise as between equally meritorious creditors, still less is the elder required out of his property to discharge the junior.

But in the particular instance under discussion the claim lacks the ordinary equitable characteristics which belong to a mechanic's lien, chargeable against a mortgage. That is made a charge upon land because it visibly increases the mortgage security, and the policy of the statute declares the encumbrancer shall only enjoy the benefit of the added value on terms of compensation.

This principle might be appropriate to work done in the original construction, or permanent betterments or additions to the railway. But debts incurred for labor or supplies employed in the mere operation of the road, in no sense whatever add to the value of the mortgage security.

The operating labor has no effect but to produce the daily earnings which may be spent by the company.

The supplies, such as fuel, oil, waste and other material, are consumed in the use, and disappear.

Such labor and supplies are essential to the operation of the road, but they only serve to the production of income. These earnings when received are the exclusive property

of the company, with the disposition of which the bondholders have no concern.

This is the settled law of this Court.

Galveston R. R. v. *Cowdrey*, 11 Wall., 453.
Am. Bridge Co. v. *Heidelback*, 4 Otto, 800.
Gilman v. *Ill. & Miss. Tel. Co.*, 1 Otto, 603.

If the income produced by this labor and material is received and enjoyed by the mortgagor corporation, it would be a most inequitable proceeding, when the mortgagee makes actual or judicial entry, to charge up against him the mortgagor's debts created for the sole purpose of producing income, to which the bondholders had no right.

The use of the engines on the roadway can only result in wearing it out, and thus make renewals and repairs necessary. As to the engines themselves, the original vendor claims the right to withdraw them from the line as being his exclusive property. According to appellee's own claim, the bondholders have received neither income nor added value to their security by the use of the engines it claims.

There is consequently not even the meager ground of an enjoyed benefit which underlies the theory of a mechanic's claim, to be invoked as an equitable consideration to justify a decree compelling the bondholders to pay the demand of the appellee, which in no sense enured to their benefit.

In this view, the decree in effect declares the power of the company to create an indebtedness covering full six months of its operation, receive all the income, appropriate it otherwise, make default on its mortgages, and then compel its bondholders to pay all its operating debts. The first creditor is thus compelled to pay to the later creditor of his own debtor a liability incurred without his privity, and which in no way benefits him.

It is incredible that a court of equity should deliberately introduce such a wanton element of mischief into juris-

prudence, and give it effective and permanent application in dealing with these vast interests.

6. Grave considerations of public policy can be legitimately invoked to overthrow this ruling. The capital of the country is supremely interested in the subject.

Statistics indicate that over two thousand million dollars of railway bonds have been negotiated in this country and are now ontstanding. They are commercial securities of the very highest character.

On foreclosure no defense is admissible against the mortgage to secure them which could not be urged as a plea in an action directly on the bonds themselves.

The value of the bonds as an investment depends in a great measure on the extent and inviolable nature of the security, on the faith of which they were marketed. That security embraces the entire system of public works of this country.

It has been a consistent feature of our jurisprudence that the " rules of property " measuring the rights in land are substantially as fixed and definite in their operations as though they constituted the text of a precise statute.

To substitute for these wise and inflexible rules of property to which the negotiations of years have adjusted themselves, the doctrine that equity can exercise at its discretion the odious and clandestine power of dismantling a landed security and effecting a substantial repudiation of a commercial obligation, is " to seal a commission to a blank " of danger."

" The doctrine contended for would utterly destroy the marketable value of all corporate securities. No prudent man would ever buy a bond in the market if the provisions made for its ultimate redemption could be altered without his consent."

Vose v. *Bronson*, 6 Wall., 456.

It is a sound maxim that the system of law is best which confides as little as possible to the discretion of the judge.

Chancery procedure is subjected to rules as consistent and precise as those which distinguish the common law.

Although a chancellor might establish the precedent of this arbitrary and vague jurisdiction, while striving administer a sentimental justice, in practice, habitual and intolerable abuses would accumulate.

The views of the different equity courts might not harmonize as to the limitations which ought to be observed in the exercise of this power of making discretionary awards out of the proceeds of a foreclosure sale. One, instead of arbitrarily ignoring the debts beyond six months, might recognize the paramount equity of all operating claims, whenever incurred; while another, on some fanciful but equally sound theory, might order the payment of borrowed money, or endorsed paper, or damages for personal injuries, until it would result that the first mortgage would be compelled to ransom itself from an undefined junior mass of liability, dependent not upon rule but on the uncertain humor of the particular tribunal.

"*Misera est servitus ubi jus est vagum aut incertum.*"

Lord BACON, observing against the vague or arbitrary exercise of judicial power, said that "he would take care "to contain the jurisdiction of the court within the ancient "mere-stones without removing the mark."

It will be found, upon consulting the precedents, that the decree overriding the elder mortgage by the junior debt, is in clear revolt against repeated and authoritative rulings of the courts.

There have been numerous instances where the contention has been made that exceptional cases of hardship or equity authorized a court of chancery to disregard the legal priority of the mortgages upon railways.

Uniformly, the response has been that no such power existed.

One of the earliest attempts to break down the clear pri-

ority of the bondholders was made in the foreclosure case of the Chicago, Alton & St. Louis Railroad in the Circuit Court of the United States for the Northern District of Illinois. A fund was in the registry arising from the sale of the road. Some supply creditors filed petitions to be paid out of the proceeds. In refusing their petitions, the Court said :

"These petioners have no specific lien, legal or equitable, upon this property. The fact that Spencer and Matteson and Litchfield agreed to pay them, did not create a specific lien. It may be conceded that, after the railroad came into the hands of Matteson and was run by him, when the parties who had liens upon the road were paid, that other parties might have an equitable lien upon the earnings of the road, but certainly they would have no right to be paid until prior incumbrances and liens have been satisfied. The fact that Matteson and Litchfield received the personal property cannot make any difference. They received it with the conveyance of real property, and these parties could not follow that personal property merely because Spencer or Matteson, or various other parties who may have had control of the company, owed them a debt.

"It may be admitted that if this road had remained in the hands of the receiver, and the parties for whose benefit he had been appointed had been paid, then these petitioners might have been entitled to receive from the proceeds in the hand of the receiver any surplus ; but what are the facts ?

"Here were large mortgages upon this railroad, which had become hopelessly insolvent. Application was made to the Court to put it in the hands of a receiver, in order that it might be operated for the payment of these mortgages. It was so done. It remained in the hands of the receiver for some years. Subsequently, other creditors applied to the Court, it being manifest that the mortgages could not be paid in that way, or at any rate that the time would be so long that it was desirable for the interests of all that the administration of the road should be changed. They asked the Court to order the property to be sold so that the parties in interest might realize upon their claims. It was accordingly sold, and the fund arising from the sale came under the control of the Court. Now what equitable lien had these petitioners on that fund ? None. Why ?

Because those who had prior liens came in and swept it away, and, more than that, have not, perhaps, been half paid. It is precisely like the case of a man who furnishes to the owner of a farm the means of carrying it on, but there is another party who has a lien upon that farm, and it is sold in order that the party who has the prior lien may be paid. Now, the fact that the mechanic or laborer has furnished the means of carrying on the farm would not authorize him to come into a Court of Equity and cut off the prior lien which exists on the farm, and prevent it from being paid.

"These parties ought to be paid. They have a just claim against this road. But it is against an insolvent corporation, and they ask parties who have a prior right and lien to pay them, because those with whom they have dealt cannot do so.

"Upon general principles, I hold what I have always held in all cases of this kind, that the party who has the prior lien is entitled to the preference, and this preference must prevail as against all, except specific liens, and these, of course, have to be paid in their order."

Denniston v. *C. A. & St. Louis R. R. Co.*,
4 Biss., 415.

An effort was made to compel a mortgagee in possession of a railway to specifically perform the executory contract of the mortgagor as to freight carriage, but the Court thus enforced the superior title of the encumbrancer:

"The contract of the petitioners confers no rights which attach by way of lien upon the property or franchises of the corporation. If it were otherwise, as it was made subsequent to and with full notice of the mortgage, it would be held subordinate to that incumbrance. Against the mortgagees or against the property of the corporation in their rightful possession, it could have no force, unless the mortgage by its terms reserved to the corporation the power to make contracts in respect to the conduct of its business which should be binding upon the mortgagees.

"To hold the mortgagees bound to render service without compensation on the ground of a contract therefor and prepayment to the mortgagors, would involve the right of the mortgagors to defeat entirely the security thus given, by depriving the property of its capacity to yield available income.

"The principle seems to us to be the same in the two cases. The mortgagee coming in by a superior title takes the subject of his mortgage clear of all obligations contracted by the mortgagor, whether personal to himself or relating to his management of the property. The right of the mortgagee is an absolute one. There is no contingency which would justify the Court in interfering to enable the petitioners to give security for the payment of such sum only as shall be found to be necessary for the payment of interest in arrear upon the bonds. The mortgagees are entitled to the whole property and all its income until payment has been made in fact. *Gooding* v. *Shea*, 103 Mass., 360. It is a legal right which cannot be limited; neither the equity nor the facts of the case warrant any such disposition of it."

Ellis v. *B. H. & Erie R. R.*, 107 Mass., 35 and 37.

In a recent foreclosure case in Alabama, a master reported in favor of paying certain corporate debts before the bonds.

In setting aside the report, Judge Woods said:

"The debt, which it is proposed to pay out of the income of the road, is a floating debt, partly secured by bonds, etc., inferior in rank to the great mass of bonds making up the bonded debt of the defendant company.

"The company has failed to pay the interest on these bonds having the superior lien, and for that reason the trustees of the first mortgage have taken possession of the road for the purpose, among others, of applying its income to the payment of the interest, and if there should be a surplus, to the principal of these bonds. The proposition is to apply, for the reasons stated, the income which the first mortgage bondholders are entitled to, to the payment of the floating debt.

"The fact that the floating debt was contracted in good faith, for the benefit of the railroad company's property, and therefore for the benefit of the bondholders, is true of perhaps all such debts. But that does not give the floating debt creditors any ground upon which to claim that their debt should be paid first.

Galveston R. R. Co. v. *Cowdrey*, 11 Wall., 482.

"But I do not understand that the floating debt creditors claim this application of the income of the road as a legal right.

"It stands simply on the ground that to refuse their payment would be inequitable. But I cannot invade the legal rights of others, to relieve the floating debt creditors from the position in which they have voluntarily placed themselves.

"The facts that a large amount of inferior securities of the railway company, now hypothecated for the floating debt, would be released by its payment, and that a reorganization of the company would be greatly facilitated and the valuable franchises of the company thereby preserved, by the proposed payment of the floating debt, are, doubtless, strong considerations, when addressed to the bondholders themselves. But can this Court waive the right of the bondholders, because we might think it would turn out to their advantage? Can we make a contract for them, because we think it would be a good contract? Have we the power to take the money which belongs to them, and give it to others without their consent, because we think it would be for their interest? They have not consented to this diversion of their money, and no one who is authorized to do so has consented for them. For the trustees to undertake to give assent for the bondholders is clearly outside of their powers and duties, which are plainly prescribed in the deed of trust.

"The Court is, in my judgment, without any power to make the decree recommended by the report. To undertake to do it would be to invade the legal rights of the bondholders, and if established, as within the power of a Court of Equity, would shake the credit of railroad securities throughout the world.

"I must, therefore, decline to adopt the recommendations of the Master."

Duncan v. *Mobile & Ohio R. R.*, 2 Woods, 545.

The Supreme Court of Ohio declined to subvert the mortgage security on application of a creditor who claimed a preference on a debt due him for money advanced to pay taxes on the railway, for bond interest and right of way.

It was said by it:

"It appears that the consideration of the debts for which

the defendant, Hilliard, recovered a judgment was for moneys advanced in payment of interest and taxes, and for right of way. This, it has been suggested, gives him an equitable claim, as against the mortgagees. We have already adverted to the peculiar position in which the nature and character of the mortgages place the directors of the company and the mortgagees. The directors acquire property for the use of the road; this may be done from the earnings of the road, with money borrowed, or upon a credit.

"We are not inclined to exempt the company or the mortgagees from the application of any rule of law which would properly apply to the dealings between them, or to the property which is the subject of these dealings, and which would secure or protect the just claims of third persons. But we are bound to respect the claims of the mortgagees, and do not feel authorized to modify the settled rules of law which govern the dealings of third persons with the directors of the company, so as to impair that security which the mortgagees, under the terms of a contract authorized by law have obtained. It is possible particular cases may arise, which, owing to the peculiar relation between the directors of the company and the mortgagees as to the use and disposition of the property, and increase, may present equitable considerations calling for relief. But we need not discuss or conjecture the character of such cases. It is sufficient to say that none of the claims in this case present such considerations."

Coe v. *The Columbus, Piqua & Indiana R. R. Co.*, 10 Ohio, S. 404.

An action was brought by a contractor, claiming that an agreement for a charge upon the moneys arising from the sale of mortgage bonds entitled him to a preference over the bonds in case the fund was not so appropriated, because his work had largely created the mortgage security.

The claim for priority was rejected, the Court deciding:

"Nor was it in the power of the corporation and the trustees combined to create a charge or lien on the property covered by the mortgage, which would take precedence of that of the trustees of the bondholders, which by the express declaration of the indenture itself, was to be

the 'first and only lien on the property and franchises of the company.' The bondholders advanced their money upon the faith of the security in the existing property and value of the road and its appurtenances, and the property and value to be added by the expenditure of money advanced by them.

"As no property had been acquired under the mortgage except such as by its terms was to be subject to the first and only lien, under the mortgage, in favor of the bondholders. The 'charge' in favor of complainant, if any agreement for such charge had been made, and if such agreement had been assented to by the trustees, would have been subordinate to the first lien created by the indenture. The advances made by the bondholders were made npon the faith of such security, and the fact that complainant's labors had added to the security of the bondholders, would not subordinate their lien to his, if he had one."

Dillon v. *Barnard*, 1 Holmes, 394.

This case is in precise accord with two decisions of this Court.

In the earliest cause, Walker had actually constructed the greater portion of railway with his own means, under an agreement that he was to remain in possession, and receive all the earnings until he was fully paid. Prior to his contract and work there was a recorded mortgage on the projected road, although but little work had been done.

Dunham v. *Railway Co.*, 1 Wall., 268.

In the later case of the *Galveston Railroad* v. *Cowdrey*, 11 Wall., 482, the precise doctrine of natural equity which will be pressed into the service of sustaining this decree, was strongly urged.

A part of the road was laid with iron belonging to Pulsford. An elaborate argument was presented by his counsel, based on analogies from the civil and maritime law, and claiming priority because his capital applied to the road had conserved it and rendered it capable of being operated.

The Court declined to adopt the principle.

"All that it is necessary to say is that the rule referred to has never been introduced into our laws, except in maritime cases, which stand on a particular reason.

"By the common law it is an inflexible rule that whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which do not affect the question here. The rails put down on the company's road became a part of the road. The road itself was included in the mortgages of the complainants. Pulsford, by allowing his property to go into or become part of the road, consented to its being covered by the mortgages in question.

"He acquired no lien which can displace them. In certain States a lien is created by statute in favor of mechanics, called the mechanics' lien, by which a person furnishing materials or work on a building acquires a lien on the property to secure the payment of his claim. But this kind of lien did not exist in Texas in favor of those who supplied materials or money for constructing railroads. We have no hesitation is saying that Pulsford's claim to priority cannot be maintained."

The Supreme Court of Iowa have reached the same conclusion as to the respective rights of railway mortgagees and creditors furnishing current supplies for the operation of a completed road.

"The plaintiffs are affected with knowledge of the existence of the mortgage, and seeing that the road had mortgaged all its future acquisitions, they could and should have protected themselves by refusing to sell the ties without payment or security.

"It surely cannot be claimed that the plaintiffs, in virtue of their lien, are in any better position than would be a second mortgagee of the road. Could such mortgagee claim priority over a holder of a bond, secured by the first mortgage, but not negotiated until after the second mortgage was issued? It seems to us that to such person it would be said: 'You saw the record of the prior mortgage—knew what it was given to secure; you voluntarily advanced your money subject to the prior encumbrance, and you cannot now be preferred to any part of it.'

"Wherever the acquisition becomes so attached to the principal thing as to become a part of it, the prior mortgage fastens to it, and the lien of the mechanic or ma-

terial man is postponed to that of the mortgagee. This is the result of the decision in 11 Wall., 459, and of our own decisions in *Getchell* v. *Allen*, *supra*, and they are, it seems to us, based upon the soundest principles of law and reason."

Nelson v. *Iowa Eastern R'y Co.*, 2 C. L. J., 741.

This same view was enforced by Circuit Judge Dillon in the foreclosure case of the Burlington, Cedar Rapids & Minn. Railway, after the most elaborate examination. He thus announced the rule:

"Where there is a prior lien on the building or railway, these once having been completed, and a mechanic subsequently does work or furnishes materials, he has a lien; but a lien subordinate to the mortgage, and which must be enforced as such, and it is accompanied with no right of removal.

"When does such lien attach, and how is it to be enforced? As against the owner the lien attaches from the time the repairs are begun. This is plain enough and just. But how does this lien attach as against a prior mortgage of land and building? The answer is, at the same time it attaches as against the owner. The result is that repairs on a previously completed building or railway on which a mortgage rested prior to the commencement of such repairs, do not give a lien which will override the lien of the mortgage. The legislature has not authorized the owner of a building or railway, on which such owner has given a mortgage, to improve the mortgagee out of existence, by making repairs *ad libitum*, and furnishing the owner the necessary credit therefor, by giving the mechanic and material men a lien paramount to the mortgage. Such a view has neither law, justice, equity or public policy to recommend it."

Taylor v. *B., C. R. & M. R'y.*, 9 C. Legal News 329.

These precedents serve to establish that the ruling below was contrary, not only to fundamental legal principles, but also to the universal practice of the courts.

These authorities are controlling. The decree below falls clearly within the principle they enforce. No matter

in what particular guise these alleged superior equities have sought recognition, the courts have with entire accord refused to abrogate the plain and rigid rules whereby the rights of mortgagees are established.

It is not difficult to perceive that the adoption of any obscure and shifting boundaries in their stead is a judicial experiment which will be attended with disaster to all the interests involved.

II.

PETITIONER CANNOT LAWFULLY RECOVER PURCHASE PRICE OF THE ENGINES, NOR COMPENSATION FOR THEIR USE BY A RECEIVER, IN THE FORECLOSURE SUIT, BECAUSE THE TRUST DEED OF 1869 BECAME A SUBSISTING AND PARAMOUNT LIEN THEREON, AS SOON AS THE ENGINES WERE PURCHASED BY AND DELIVERED TO THE RAILROAD COMPANY, AND THE WRITTEN CONTRACT UNDER WHICH PETITIONER CLAIMS TITLE IS VOID AS AGAINST THE APPELLANTS, UNDER THE LAWS OF ILLINOIS

Appellee's title is based on the paper contracts.

The price is fixed, and time and place of delivery. The engines had been in the possession and use of the corporation when the foreclosure action was instituted.

If this constituted the whole transaction, it could hardly be contended that the vendor could resume title after completed sale and delivery.

Reliance is made to support the claim of title on that part of the agreement which declares, "engines to remain "the property of the petitioner until paid for."

It is an undisputed fact that this contract was never acknowledged or recorded in any manner.

It is also clear that from the date of the original sale in

1875 to the present time, petitioner has never retaken possession of the engines.

On these facts can it recover the title as against the mortgagees?

When the foreclosure action was begun all these engines were on the line of railway, constituting a part of its reglar equipment.

The mortgage in explicit terms embraced all cars, engines, etc., of every nature and kind whatever, including all that it might thereafter acquire either in law or equity,

When this mortgage was executed in 1869, this species of conveyance had receive an explicit and definite interpretation by the Court.

It was held that such an encumbrance was precisely as effectual to cover and bind after acquired equipment, as though it had all been in existence when the mortgage was delivered.

Such is the doctrine repeatedly announced by this Court:

"A mortgage of a railroad company which covers, in the terms of the mortgage, its engines, cars, and machinery, carries not only those in existence at the date of the mortgage, but such as take their place, or are subsequently added to them by the company, and exist at the time of the foreclosure."

Pennock v. *Coe*, 23 How., 117.
Minn. Co. v. *St. Paul*, 2 Wall., 635.
Putnam v. *Bill*, Oct. Term, 1877.
Galveston R. R. v. *Cowdrey*, 11 Wall., 483.

The Supreme Court of Illinois, in *Palmer* v. *Forbes*, 32 Ill., 248, announced the same view, holding that engines and cars were in the nature of chattels real, and whenever they came into the possession of the company by purchase, became immediately subject to the mortgage.

This construction of the mortgage was, therefore, at its date, a fixed rule of property.

Besides this judicial interpretation, the charter had ex-

pressly authorized it to mortgage any of its property to be thereafter acquired.

The mortgage creditors, having this indisputable lien upon these engines purchased from petitioner by the corporation, delivered into its possession, procured the appointment of the receiver.

As it has been before remarked, this was equivalent to an actual entry of possession by the mortgagee.

Boyd v. *Burke*, 8 Irish Eq., 660.
Mass. Hosp. Life Ins. Co. v. *Wilson*, 10 Met., 126.
Am. Bridge Co. v. *Heidelback*, 4 Otto, 800.
Howell v. *Ripley*, 10 Paige, 43.
Astor v. *Turner*, 11 Paige, 436.
Coe v. *C. P. & I. R. R.*, 10 Ohio S., 404.
Noyes v. *Rich*, 52 Maine, 116.

The bondholders' title to the engines is based on the fact that they are described in the mortgage, and their lien has been still further ripened and enforced by an actual possession taken in their interest.

Can the intervening petitioner overthrow this mortgage and possession, and recover title to the engines?

Its contract sells the engines to the company. That sale is perfected by actual delivery. The title is attempted to be retained in the vendor, but solely by way of security for the unpaid portion of the contract price.

Petitioner had no right of possession, use, or disposition thereof, and the risk of the property was with the railway.

The exact legal character of the contract is thus defined by the Supreme Court of Illinois:

"It was a conditional sale, with a right of rescission on the part of the vendor, in case the purchaser should fail in payment of his installments. A contract legal and valid as between the parties, but made with the risk on the part of the vendor, of losing his lien in case the property should

be levied upon by creditors of the purchaser while in possession of the latter."

March v. *Wright*, 46 Ill., 488.

The transaction is precisely as though the petitioner had executed a formal bill of sale for the engines, and taken back an unrecorded chattel mortgage for the credit payments.

The contract reserving this lien was never acknowledged or recorded, and the term of credit was for three years.

By the express term of the statutes of Illinois, this writing "having the effect of a lien" upon the engines, is invalid as against "the rights and interests" of the bondholders in actual possession under their specific lien, for three reasons:

1. It is not acknowledged before the officer required by the act.

2. It was never recorded.

3. The credit was longer than the limited term of two years, and the petitioner made no attempt to enforce his claim of lien until about two years from the date of the original engine delivery.

Ill. Stat. (1874), Secs. 1 and 3, pp. 711, 712.

Petitioner is prevented by the prohibition of the statute from using the paper as a muniment of title. At common law, delivery is conclusive evidence of a completed sale.

As against the bondholders, the secret paper is wholly unavailing and void. It cannot be introduced to contradict the conclusive evidence of the company's title, as shown by its continued and exclusive possession and enjoyment of the engines.

Although the bondholders or trustees might be fully charged with actual notice of the existence of the paper, it is nevertheless of no validity, because the statute distinctly makes it wholly void, irrespective of notice.

The invalidity of such an unrecorded and unacknowledged contract for a lien is settled by a long and thoroughly consistent line of decisions of the Supreme Court of Illinois interpreting the statute.

Ketcham v. *Watson*, 24 Ill., 591.
Forest v. *Finkham*, 29 Ill., 141.
McCormick v. *Hadden*, 37 Ill., 371.
Sage v. *Browning*, 51 Ill., 217.
Frank v. *Miner*, 50 Ill., 445.

The whole subject has been recently adjudged by this Court in a case where a manufacturer, by a written contract, sold an engine, delivering possession, but reserving title until the purchase price, which was placed in the guise of rent, should be paid.

The judgment on the validity of the transaction was:

"The policy of the law of Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by statute. The courts of Illinois say that to suffer without notice to the world, the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. Accordingly the actual owner of personal property, creating an interest in another, to whom it is delivered, if desirous of preserving a lien on it, must comply with the provisions of the chattel mortgage act.

"R. S. Ill., 1874, 711, 712. It requires that the instrument of conveyance, if it have the effect to preserve a mortgage or lien upon the property, must be recorded, whether the party to it be a resident or non-resident of the State.

"If this be not done, the instrument, so far as third persons are concerned, has no validity.

"Secret liens which treat the vendor of personal property who has delivered possession of it to the purchaser, as the owner until the payment of the purchase money, cannot be maintained in Illinois.

"They are held to be constructively fraudulent as to

creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession."

Hervey v. *R. I. Locomotive Works*, 3 Otto, 672.

For these reasons the decree of the Circuit Court ought not to stand.

The right of the bond creditors to the sale proceeds of the property mortgaged to them, whatever theory of engine ownership be true, must suffice to reverse the money decree awarded against the fund.

The order declaring title in petitioner cannot be affirmed without giving effect to a paper which the statute expressly declared shall be void.

HENRY CRAWFORD,
Solicitor for Appellants.

JAN., 1878.

APPELLANT'S REPLY,

AND

SUGGESTIONS AS TO THE ADDITIONAL RECORD.

It was stated from the bench when application was made for the *certiorari*, that all questions as to the admissibility or weight of the new matter would be considered on the final hearing.

The arguments of opposing counsel have been to a considerable degree based on the transcript returned under the *certiorari*.

They contain also a number of serious misrepresentations as to the legal proceedings in the Circuit Court which, unless corrected, might possibly work injury to the appellants' interest.

These suggestions are filed, therefore, mainly to object to the consideration of any of the matter returned under the writ, and to correct these misrepresentations.

A formal motion has been filed to reject the additional transcript.

As the three causes—Nos. 940, 1,029 and 1,030—are substantially submitted together, what is said herein will apply to each case.

1. The additional transcript returned by the clerk of the Circuit Court contains, from pages 1 to 58, inclusive, *portions* of the record in an equity suit of Stephen Osgood against this railway company. These portions, according to the return of the clerk, he embraces, because directed by the counsel for the intervening petitioners. (Add. Record, p. 58.)

The record shows the Osgood case was a separate suit, brought originally in the State Court. The parties are

not the same as in the Fosdick case. None of the appellees are parties, nor have they ever intervened in that cause. It does not appear that any final decree has been reached therein.

The Circuit Court refused to consolidate that cause with the main foreclosure suit, (Add. Record, p. 58,) and they have proceeded separately.

The two causes being distinct, the culled portions of the record of the Osgood case have no legitimate place in the transcript on this appeal. The Court ought, therefore, to decline considering them, and tax the costs thereof against the appellee.

Counsel states in his brief, (page 4,) that it will appear that the receivers appointed by the State Court paid for supplies and other necessaries for the actual working of the road.

If this is designed (as it apparently is) to create the impression that the State Court receivers paid any *corporate* liabilities for supplies, the statement is wholly unsupported by the record, or the actual facts.

Their reports appear on pp. 56, 57 of the Add. Record, and show they disbursed only for *receivers'* operating expenses.

2. The remaining matters of the additional transcript, from pages 59 to 77, pertain to the foreclosure action.

No necessity or propriety existed for embracing the original bill of February 27th, 1875, in the new transcript. It had been superseded by the filing of a new supplemental and amended bill, which was a complete pleading, and on which issue was joined and decree based. The latter with all its exhibits is set out at large in the appellant's original transcript, and sufficed to present every question involved in this appeal.

Attention is called to the certificate of the clerk support-

ing those items of the Add. Record, from p. 65 to 77 inclusive.

He does not certify them to be full, true and correct transcripts of the record, but that they are transcripts of "*drafts or memoranda, with all their indorsements thereon, "from which* the orders were entered of record," &c. (Add. Record, p. 77.)

Such a certificate is unknown both to the statute and the practice of the court.

"Drafts or memoranda," from which orders are entered, constitute no part of the record; still less do "endorsements" on such papers.

The law defines what makes up the record in an equity cause, and the clerk can only certify these.

R. S., §§ 698, 750. Rule 8th, 3d Clause.

The original transcript filed by the appellants was a liberal compliance with the rules of this court. It contained every pleading, exhibit, deposition or entry which could possibly be necessary to a complete understanding and correct decision of the questions at issue between the adversary parties on these appeals.

Obviously this alien matter is sought to be brought into the record for no other reason than to furnish apparent support for the statement found on page 6 of appellee's br

"Most all the allowances made by the court for this "and kindred claims, were acquiesced in by all the parties "and counsel concerned, and many of the orders. Cer- "tainly this one, *originally*, was entered by consent, and "the motion to set aside this allowance was an after- "thought consequent upon the near conclusion of the "powers of the court."

In the briefs, in Nos. 1029, 1030 (page 5), similar language is employed as to consent orders, with the broader observation, "*no resistance being made to any of them until*

" *it was apparent that the powers of the Circuit Court* " *were nearing a conclusion.*"

In support of this statement, appellee calls attention of the court to a list of claims asserted to be those paid by consent.

No pretense is made that the particular decrees appealed from were by consent. The record shows they were not. The counsel seek to invent a new legal position. Notwithstanding these allowances were contested, and the bondholders insisted upon their priority at every step, it is argued because they have acquiesced in the allowance of what are described as kindred claims, this appeal must fail.

This court of last resort, discarding the actual adversary state of the record, is, in effect, asked to decree the specific performance of some pretended, vague, " tacit understand- " ing had by the court, parties and counsel " as to the payment of floating debt claims.

Certainly, as a legal proposition, absurdity could not go further. This appeal must be decided according to the issue actually involved.

But apart from its legal insufficiency, the appellants challenge the statement, which is made on the basis of these " drafts or memoranda," culled under the direction of the counsel, as uncandid and unwarranted by the record.

Statement. "Most all the allowances made by the Court " for *this* and *kindred* claims were acquiesced in *by all* the " parties and counsel concerned," &c.

Correction. To pretend that the bondholders ever acquiesced in either of these three allowances appealed from, is to boldly disregard the record.

In the Schall and S. W. Car Co. cases, instead of acquiescing, answers to the intervening petitions denying the claims of the petitioners, and insisting on the title and pri-

ority of the bondholders, were filed *on the very day* the petitions were presented.

Record Schall Case, p. 75.
Record S. W. Car Co. case, p. 80.

In the petition of the Hinckley L. Co. Works, (Orig. Record, p. 72), no claim was made of *lien* on the fund, or priority over the bonds, nor was there any prayer for the receiver to pay any money whatever. The only prayer and the reference was to ascertain the *balance due from the Co. under the contract, by the terms thereof.* (p. 73.)

On all the claims, as soon as any attempt was made to pay them out of the fund before payment of the bonds, there were prompt exceptions and resistance.

Hinckley case, Orig. Rec., p. 121.
S. W. Car case, Rec., p. 105.
Schall case, Rec., p. 100.

That will suffice for the pretense that there was any acquiescence in the allowance of *these* claims.

Statement. " Allowances for *kindred* claims were acqui-
" esced in by all the parties and counsel concerned." It is in support of this, that attention is called to the list of " claims paid by consent."

Correction. This is undeniably intended to create the impression, that the additional record exhibits nothing except " consent " allowances of claims, which are " kindred" to these appealed from.

If the inquiry were pertinent, the only legitimate and fair method of advising this court judicially, of the exact nature of the allowances, and whether they were " kindred " claims, would have been to incorporate in the record the several petitions, answers, evidence and master's reports, on which the allowances were based. But all these have been cautiously withheld, and nothing presented here save counsel's draft of final allowances wrenched from their context. This court has, therefore, solely, the counsel's

statement that all these are consent allowances of kindred claims.

If he had taken any pains to inform himself of the exact nature of the demands thus sought to do duty as kindred claims, he would have found that nearly the entire list is made up of demands allowed upon wholly different grounds. Phelps (Add. Record, p. 69) was paid for attorney's services in the Osgood case. Ranney for money due, him on receivership account (Rec. p. 70), while Hubbard, Simons, Walker, Parker, Nolan, Williams & Thompson, Block, Carpenter, Smith, Townsend, Fierstein, Shelby, Mallory and Dow, had allowances either for the rent or purchase money of real estate, necessary for the railway, actually used by the receiver, and to which the several petitioners had title.

Rolle, Junker & Co. claim was an adjustment with large shippers for freight advances on an executory shipping contract adopted by the receiver. (Record, p. 68).

The order copied in (Add. Record, p. 86), as to William Adams, was not made by consent. It does not so indicate. It was made *ex parte* on the application of the receiver, without notice indicated to any of the litigants, and long before the appellants had intervened in the cause.

It is true that the claims of Kelly and others, shown on page 67 of the Add. Record, were *kindred* claims, but the exact reliance to be reposed in the statement that they were consent allowances, or that "no resistance was made "to any of them until it was apparent that the powers of "the Circuit Court were nearing a conclusion," (Brief, p. 5), can be best appreciated by the last item of the additional transcript which the counsel opposed going into the return (Add. Record. p. 78).

That shows that the bondholders, within less than four months from the time the Federal Court receiver took possession, filed formal objections to the allowance of these

very claims of Kelly, Hess, English and others, and the allowances made were in every sense adversary proceedings, as shown by the entry (p. 67).

The exact truth is, that the culled claims which are consented to, are not "kindred" with these in controversy, and the record shows the kindred claims were not acquiesced in, but were contested.

Statement. "This case is brought here, it will be observed, by the vendees or purchasers at the sale," which is "an important fact to be borne in mind in the subsequent examination of the case, because whatever the rights of Fosdick & Fish, the trustees, may have been, it does not follow that the vendees succeeded to all of them." (Brief, p. 5.)

This is repeated in each of the briefs.

Correction. The records all show:

That the exceptions were filed by the intervening bondholders.

That they appeared in the master's office, and contested the orders for payment, and finally, that the appeals were prayed by, and allowed to, the *intervening bondholders.*

Record, Hinckley, p. 126.
" S. W. Car Co., p. 107.
" Schall, p. 101.

The vendees at the sale have never taken any appeal whatever, and we presume it is an important fact to note that the rights of the actual bondholders are, in equity, quite as ample as those of the trustees who are mere stakeholders of the trust property.

Statement. "The opposition *now* made is in gross violation of the tacit understanding had by the Court, parties and counsel, that if this road was to be held by receivers, and the power of the court invoked to run and manage it for the bondholders, these claims incurred for their benefit and in their interest were to be paid."

Correction. This is a clumsy fiction devised to answer the exigencies of a failing cause.

Who were the *other* contracting parties who entered into a "tacit understanding" with a court of justice as to how the anticipated revenues of a railway should be disbursed?

Did the trustees make this compact; and if so, how and when? If the bondholders' rights were, and are paramount, what possible commission did the trustees possess to barter them away by some tacit understanding with a court, or any one else? These bondholders did not intervene in the cause until long after the appointment of a receiver by the Federal Court, and there can be no truthful claim that they had any tacit, or other understanding whatever, on the faith of which the receiver was appointed.

The record very effectually disposes of this claim of a tacit understanding as to this class of demands.

The bill prayed the appointment of a receiver. In granting it, the Court fixed no judicial toll, as the price of doing what was his clear judicial duty to do when an admitted case of a defaulted mortgage, inadequate security, and insolvency of the mortgagor, was made out.

If, then, there was any such court compact, why does not the order appointing a receiver recite that the earnings were to be applied to the payment of floating debt, as a preferred claim? It does not. (Record, p. 1.)

Yet it would be the greatest folly to advance as a chief reason for the allowance of a large sum that, although the law would not ordinarily justify it, there was some tacit understanding with the court that, in such instances, the law must be put aside.

Why, if there was a tacit understanding of the character stated, did the amended bill charge, (page 4,) and the answer concede that the mortgage was a first lien on the whole property, (p. 64), and why did the court entertain the

bondholders' petition, and answers to their petitions, and exceptions to their allowances, distinctly raising the same questions which we now ask this Court to decide, as to the priority of their mortgage lien ?

Why, if there was such a tacit understanding originally, was it not brought upon the record and reduced to certainty by some paper or affidavit evidencing its existence, after the claimed violations thereof had begun as early as September, 1875 ?

Why, if there was such a tacit understanding, waiving the bondholders' rights, did the court hear and decide the allowances "on the merits," as shown by its own order ? (Hinckley, Record, p. 126.)

The position of the bondholders is very clear and strong. Their rights rest on written and recorded muniments. They did not give them away by any understanding, tacit or otherwise, and the trustees had no lawful power to do so.

A "tacit understanding" on this subject implies that, without it, the rule as to payment of this class of claims would be different, but the very extract cited in the brief from the opinion of the Circuit Judge, (p. 19,) shows that, instead of these allowances resting on the unsatisfactory basis of a tacit understanding covering their payment, he has, on a full examination of their equities, decreed their payment as a legal right.

Thus :

"As I stated during the argument, we have adopted a "rule in this State which has the advantage of being *a* "*fixed and permanent rule*."

"I do not feel inclined to *depart from* the PRACTICE "*which has been* ESTABLISHED. It does allow the employ- "ing of persons who have done work, and persons who "have furnished supplies and material, a compensation for

" all that has been done, and all the supplies that have been " furnished within a reasonable time."

The allowances below were made on the theory of that " fixed and permanent rule," that " established practice," from which the Circuit Judge, on full examination, declared he would not depart.

The merit and lawfulness of that " fixed rule " and " established practice " are fairly before this Court for its review, and we have the right to demand a decision on that issue.

These appeals are, in fact, test cases, which involve the principle of a considerable number of such allowances which will not admit of separate appeals, in consequence of the amount being below $5,000.

In the brief in Nos. 1,029, 1,030, occurs the

Statement, " so far as this record is concerned, there is no " evidence that Fosdick and Fish, the complainants in the " main case, ever *sought* or prayed an appeal, not having " joined in the bond." (Page 5).

Correction. The point is somewhat immaterial whether they did or not, as certainly the bondholders would be entitled to the use of the trustees' names if necessary; but in these instances it so happens the record distinctly shows that the trustees joined in the exceptions and in the appeal.

Record S. W. Car Co., p. 104.
" Schall, pp. 100, 101.

Statement. " This, it will be observed, was not a pay- " ment for locomotives, nor was it a payment in any way " *made under* or *by virtue of any existing contracts* for the " purchase of locomotives, but was," &c. (Brief, p. 9).

Correction. The allowance could only be justified by the allegations and prayer of some petition.

The only petition filed is at page 72 of the Orig. Record.

After stating the contracts with the railroad company, the petition prays "that the said *contracts* and notes be re- "ferred to the Master in Chancery of this court to ascer- "tain the balance due your petitioners from the said road, "and that the said Master be directed to hear the testi- "mony in relation thereto, and to *ascertain the balance due* "*under such contracts* from the said company to your peti- "tioner." The contracts are attached as exhibits.

"The reference ordered the Master to report as to the "balance for which the said road is liable, *by virtue of said* "*contracts under the terms thereof*." (Orig. Record, p. 73.

The Master reported an amount based on fifty per cent. of the original *contract price* as a compromise settlement of the claim. (Orig. Record, p. 100.)

This petition, report, and attached evidence, furnishes the only basis for the allowance which it is stated is *not* a payment in any way made under or by virtue of any contract for engine purchase.

Statement. "Appellee's locomotives drew their trains, "and brought in their freight charges and passenger fares. "Without them, their road was useless and valueless, and "destitute of revenue."

Correction. Anderson, receiver, swears that the engines were unsuitable, and not valuable for use on the road, and that constituted one of the reasons why he surrendered them early in his receivership. (Orig. Record, p. 105.)

The brief (p. 16) makes the further

Statement. That the court found that each of the Schall cars, when delivered to the railroad company, was marked, "this car is the property of Michael Schall, York, Penn."

On this quite an argument is based to the effect that this was notice of Schall's title.

Correction. This so-called finding of the court has no

evidence, exhibit, or paper whatever to support it; absolutely nothing.

The original petition does not claim it. (Record, p. 74.)

The contract does not show it, but that the cars are to be lettered and numbered as per direction of the general manager. (Record, p. 99.)

The evidence of the only witness, Anderson, does not indicate it; neither does the Master's report. (Record, pp. 94–99.)

The receiver testified the cars were part of the regular equipment; were worth about $300 to $320 each, and $197.00 had been paid on each. (Report, p. 99.)

The claim that the *vendees* cannot hold the cars because not embraced in the schedule of property sold, is pointless, because on this appeal the court is asked to adjudge the rights and liens of the *bondholders*, whether the personalty in dispute has, or has not been sold by the Master.

If it is not sold, the mortgage lien will hold it as against the appellee, if the bondholders' claim to priority be well founded. Nor could any *ex parte* act of the Receiver, such as dealing with Schall as owner, or paying rent, be of any weight in concluding the appellants' rights.

The third paragraph of the argument justifying the decree below under the clause of the trust deed specifying what payment the trustees in possession should make, is sound in law, but bad in application.

The mortgage trustees in possession could only deduct for operating expenses incurred by them while in possession. Likewise the Receiver.

The claim of appellee, not being for expenses incurred by the receivership, ought not to have been given priority out of the fund.

The brief claims that under the new constitution of 1870, the trust mortgage is a nullity, for lack of proper acknowledgment. That while the mortgage is a first lien

on the real estate, appellee had first lien on the personalty, especially such as was acquired after the adoption of the Illinois constitution, in 1870.

All this fine drawn distinction is an afterthought. If any such thing had been relied on, the petition of intervention should have claimed the right to an allowance out of the sale of personalty, separately made, and had that fund marshaled not simply to pay the petitioners' claim, but all other labor and supply claims similarly situated.

There is no allegation or proof on which to base this distinction, and avoid a reversal. The petition does not claim a lien on the rolling stock alone, nor was any testimony taken as to the value or existence of equipment acquired after 1870. The facts shown by the record will not, therefore, avail the theory. The bill claims that the mortgage is a first lien *on all the property, real and personal*; the answer admits it, the decree finds and adjudges it. On this decree no errors are assigned by appellee. The validity and scope of the mortgage are, therefore *res judicata*.

But the legal proposition is monstrous. The trust deed was executed and the bonds were sold in open market long before the new constitution. The charter of the company authorized it to borrow money, issue bonds, and secure the payment of the same by a mortgage covering all the property of the company "*then existing or thereafter to be acquired.*" As to that company this chartered power palpably emancipated the one mortgage which might be executed on both real and personal property from the operation of the chattel mortgage law. That required a "schedule" of the personalty to be attached. That was impossible in case of *after acquired* personalty.

But at the date of this mortgage, the Supreme Court of Illinois had given a fixed construction to such mortgages.

Rolling stock was declared not to be personalty, but in the nature of fixtures, and covered, no matter when acquired, by a mortgage of the railway then made, and to be made.

Palmer v. *Forbes*, 23 Ill., 248.

Such was the settled law of this Court, and of other States, without exception.

The constitutional provision quoted was prospective in its nature and operation, and can only apply *to mortgages executed after its adoption.*

The attempt to invoke this later law to limit the security and impair the obligation of the mortgage contract, notwithstanding it was clearly valid and exhaustive in its scope when it was executed, would be to give the section a construction which would make it unconstitutional.

Ohio L. Ins. & T. Co. v. *Debolt*, 16 How., 432.

Gelpecke v. *Dubuque*, 1 Wall., 206.

The scope of our mortgage must be adjudged by the charter, and the judicial decisions at the date when it was delivered.

According to *Palmer* v. *Forbes*, and the universal current of authority, it was a security precisely as valid and effective upon all engines and cars acquired after its delivery as those then actually covered, and this result reached wholly independent of the chattel mortgage law.

Before any attempt was made by the intervening petitioners to enforce any pretended claim of lien on their behalf, all this property owned by the corporation on February 27, 1875, was reduced to possession by the actual appointment of a receiver, on a bill to foreclose, claiming a first lien on all the equipment.

Whatever fault in a mortgage acknowledgment, the re-

duction to possession is tantamount to a complete investiture of title.

Hunt v. *Bullock*, 23 Ill., 264.
Atkins v. *Burns*, 71 Ill., 326.

HENRY CRAWFORD,
Solicitor for Appellants.

SUPREME COURT OF THE UNITED STATES.

WILLIAM R. FOSDICK ET AL. *vs.* MICHAEL SCHALL.	No. 1,029.
F. W. HUIDEKOPPER *vs.* HINCKLEY LOCOMOTIVE CO.	No. 940.
WILLIAM R. FOSDICK ET AL. *vs.* THE SOUTHWESTERN CAR CO.	No. 1,030.

Brief of The Farmers' Loan and Trust Company, with Arguments of Ashbel Green and J. Augustus Johnson, of Counsel, in case of Farmers' Loan and Trust Company *vs.* The Indianapolis, Bloomington and Western Railway Company, involving similar questions.

NEW YORK.

1878.

UNITED STATES CIRCUIT COURTS,

FOR THE SOUTHERN DISTRICT OF ILLINOIS AND DISTRICT OF INDIANA.

MALCOLM C. TURNER *et al.*
vs.
THE INDIANAPOLIS BLOOMINGTON AND WESTERN RAILWAY COMPANY *et al.*
} *Original Bill in Chancery.*

AND

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE INDIANAPOLS BLOOMINGTON AND WESTERN RAILWAY COMPANY *et al.*
} *Cross Bill.*

STATEMENT OF FACTS AND POINTS FOR THE FARMERS LOAN AND TRUST COMPANY, ON PRIORITY OF CLAIMS, FOR LABOR AND SUPPLIES.

ASHBEL GREEN,
R. E. WILLIAMS,
J. AUG. JOHNSON,
Of Counsel.

Baker & Randolph, Printers, Indianapolis.

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THE FARMERS' LOAN AND TRUST COMPANY
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STATEMENT OF FACTS.

The Danville, Urbana, Bloomington and Pekin Railroad Company, was incorporated by a special charter from the State of Illinois, approved February 28, 1867, and amended February 25, 1869, with authority to locate, construct and operate a line of railroad from the city of Pekin to the eastern boundary line of the state of Illinois by way of Urbana and Bloomington and Danville, in the said state.

The Indianapolis, Crawfordsville and Danville Railroad Company, was incorporated by a special charter from the state of Indiana, approved prior to July 12, 1869, with authority to locate, construct and operate a line of railroad from Indianapolis to the western boundary line of the state of Indiana.

In execution of the powers conferred by its charter, the said Danville, Urbana, Bloomington and Pekin Railroad Company, issued bonds to the aggregate amount of two millions dollars, and secured the same by a mortgage or trust deed, executed to the Farmers' Loan and Trust Company, Trustee, bearing date April 1, 1869, covering all of the railroad of said company, extending from Pekin, Illinois, to the eastern boundary line of the said state, together with its rolling stock and other property then owned or subsequently acquired. This mortgage was recorded in the proper counties prior to May 6, 1869.

The said railroad companies were consolidated July 12, 1869, and became one corporation, as by their charters and the laws of the states of Indiana and Illinois they were duly authorized to do, under the name of the Indianapolis, Bloomington and Western Railway Company. Subsequently the said consolidated company duly executed a mortgage to the Farmers' Loan and Trust Company, Trustee, dated October 1, 1869, covering all the property of the said consolidated company in the said states of Illinois and Indiana, together with its rolling stock and all other property then owned and subsequently to be acquired, and recorded in the proper counties prior to November 4, 1869, to secure

an issue of bonds declared on their face to be first mortgage bonds, amounting in the aggregate to the sum of five millions of dollars. Both said mortgages contained explicit covenants that the corporation should execute conveyances of said mortgaged property by way of further assurance; that after six months default of interest, the principal of all the bonds should, at the election of the Trustee, become due and payable; and that the Trustee might take possession of the mortgaged property, receive the moneys derived from operating the same, cause the said mortgaged premises to be sold and apply the proceeds to the payment of the expenses of management and the interest and principal of all the outstanding bonds.

A subsequent mortgage was executed by the said company, Oct. 1, 1870, to Benjamin E. Smith and William Dennison, Trustees, to secure an issue of second mortgage bonds, amounting in the aggregate to the sum of one million five hundred thousand dollars, which mortgage was filed for record in said month of October, 1870, in the counties through which said road passes.

The said issues of bonds were negotiated by the said railway company soon after their date, and are outstanding in hands of holders for value, with the exception of two millions of dollars of bonds of the first mortgage issued by the consolidated company, the said two millions of bonds having been reserved from issue, and still remain in the hands of the Trustee.

Subsequently, the said railway company, on or about the 28th day of June, 1872, purchased a line of railroad extending from Decatur to Champaign, Ill., and west-

wardly to the Mississippi river, and from Whiteheath to Decatur in said State, and known as the Havana, Mason City, Lincoln and Eastern Railway. To complete this purchase and for other purposes, said I., B. and W. Railway Company executed a subsequent mortgage, or trust deed, dated June 28, 1872, to William Dennison and Robert Turner, trustees, to secure a further issue of bonds, amounting in the aggregate to the sum of five million five hundred thousand dollars, a portion, or all, of which bonds were negotiated. This last mentioned mortgage covered the property thus acquired by purchase, and all subsequent extensions of the same.

On the 16th day of November, 1874, the said consolidated company executed to Joseph T. Thomas, of Philadelphia, Trustee, for the purpose of securing so far as practicable, the promissory notes, acceptances and adjusted accounts incurred for the common benefit of the property of the said corporation, for the use, benefit and behoof of its creditors, a chattel mortgage upon all the engines, cars, machines, tools, wood, coal, furniture, safes, iron rails not in tracks, ties, timber, iron, steel spikes, wheels, oil, waste, stationery, offices, station and railway supplies, and all other personal property then owned by the said Railway Company, or in or to which it has any right or title, or equity, together with the tolls, receipts and income to be derived from the use of said property. This instrument was recorded as a chattel mortgage, November 17th, 1874, at 5 o'clock P. M.

On November 18th, 1874, a bill in chancery was filed by Turner Bros., of the city of New York, claiming as

bondholders and general creditors of the said I. B. & W. Railway company, in the DeWitt county Circuit Court of Illinois, and in the Montgomery county Circuit Court, of Indiana, praying for an accounting as to debts, liens and priorities of creditors and for a foreclosure of all of the mortgages on the property of the company, and for a sale of the property and the appointment of a Receiver. George B. Wright was under these bills appointed Receiver, November 18, 1874, in said county courts and still remains in possession of said mortgaged property as such Receiver.

On the 30th day of January, 1875, the Farmers' Loan and Trust Company, trustee under two of said mortgages, filed their cross bill against the said railway company in the Illinois Court, and on the following day in the Indiana Court, praying for a foreclosure of the mortgage, in which it was trustee, and the sale of the property so conveyed to said Farmers' Loan and Trust Company, setting forth the fact that the interest on the bonds secured by said mortgages was in default for a period of six months.

On the 13th day of March, 1876, The Farmers' Loan and Trust Company were requested, in writing, by a committee representing a majority of the bonds issued by the Danville, Urbana, Bloomington and Pekin Railway Company, and by the Indianapolis, Bloomington and Western Railway Company under its first consolidated mortgage, to foreclose the said mortgages, and cause the said property to be sold.

On the 26th day of April, 1876, the Farmers' Loan and Trust Company, Trustee, filed an amended and sup-

plementary bill, and on petition of the said trustee, the foreclosure proceedings commenced in the DeWitt County Court, were transferred to the United States Circuit Court for the Southern District of Illinois, and the proceedings commenced in the Montgomery County Court were also, on petition of the said Trustee, transferred to the United States Circuit Court for the District of Indiana.

On July 18, 1877, a final decree was entered in the United States Circuit Court for the Southern District of Illinois giving judgment in favor of the Farmers' Loan and Trust Company, Trustee, for $6,234,625 with interest from that date, and ordering a sale of the said mortgaged property of the Indianapolis, Bloomington and Western Railway Company, in the States of Illinois and Indiana. It finds the material averments of the cross-bill of the Farmers' Loan and Trust Company to be true, and decrees that the said mortgage or trust-deed, executed by the Danville, Urbana, Bloomington and Pekin Railroad Company to the Farmers' Loan and Trust Company, Trustee, was, and still is, a first and paramount lien upon the railroad property, franchises and appurtenances described in said deed of trust. It also finds the averments of the Farmers' Loan and Trust Company's cross-bill for the foreclosure of the first mortgage of the Indianapolis, Bloomington and Western Railway Company, executed to the said Trustee, to be true, and decrees that the said mortgage or trust-deed was, and still is, a first and paramount lien upon all of the railroad property, franchises and appurtenances described in the said mortgage.

Pending this litigation the Western Car Company, of which B. E. Smith was President, and being at the same time President of the said Railway Company, filed an intervening petition alleging in substance that by contracts dated Sept. 13, 1871, March 1, 1872, and Oct. 1, 1873, the said company agreed to furnish cars to the mortgagor corporation at twenty dollars per month for each car, the title of such cars to remain in said Western Car Company.

The decree reserves the question of rental for said cars for the period of six months prior to the appointment of the said Receiver. The decree also reserves decision as to all claims presented by intervening petitions for work, labor, supplies and material done and furnished during six months prior to December 1, 1874, when the Receiver took possession.

On the 4th day of June, 1877, the claims for labor, supplies and car rental were referred to John D. Howland and Livingston Howland, as Masters, to take evidence and report. In February, 1878, the reports of said Masters, together with the testimony taken, were filed. Exceptions were interposed by the Farmers' Loan and Trust Company, Trustee, to the Masters' reports because they were findings excessive as to amounts and were not supported by the evidence and were contrary to law.

These claims may be separated into several classes.

I.

The Western Car Company claim rent for 1172 cars, classified as box, coal and stock cars, for six months prior to Dec. 1, 1874. This was considered under an order of reference dated June 4, 1877, which provided

that, in the matter of the intervening petition and answer of the Western Car Company, said Special Masters are to ascertain and report the evidence and their findings thereon relative to the reasonable and fair rental value of the cars belonging to the said Western Car Company, and in the use and possession of the I. B. & W. Ry. Co., for the six months next previous to the 1st day of December, 1874; and also to report whether or not it was necessary and for the interest of the I., B. & W. Ry. Co. to hire and use the same in whole or in part.

The Masters allowed on this claim the sum of $105,-480.

In reference to this claim we confidently assert:

1. That the rental allowed was extravagant and against the weight of evidence.

2. That it was not necessary nor for the interest of the Railway Company to hire the cars.

In illustration of the outrageous character of this claim the evidence shows there were cars that never moved a wheel; and that some of said cars were in such wretched condition that they were refused by connecting lines and many were in a condition unfit for ordinary service.

II.

Claim of the Paris and Danville Railroad Company, taken under the following clause of the order of reference: "To ascertain and report to the Court the evidence, together with their findings thereon, relative to the issue joined upon the intervening petition of the Paris and Danville Railroad Company, by James A. Eads, its Receiver, filed herein."

1. For coal furnished within the period of six months, which the Master allowed, at the rate of $1.80 per ton, aggregating the sum of $18,522.98. This sum is largely in excess of the price per ton warranted by the evidence.

2. For right of way over lands conveyed by John C. Short & Company to the I., B. & W. Railway Company, the Masters allowed $17,262. The consideration expressed in the deed dated Dec. 30, 1874, is one dollar and other good and valuable consideration, and is in lieu of deed delivered and dated May 25, 1869. The consideration proved was a contract between Short & Company, and the I., B. & W. Railway Company for the sale of coal which has been determined by this Court as void, as being against public policy. The Receiver, Eads, claims under an assignment of this contract from Short & Co. We contend in reference to this claim:

1. That the moment the deed was executed and delivered the lien of the complainants' mortgages attached.

2. That there remains no equitable lien in favor of the vendor superior to the complainant's mortgage.

3. The claim, if any, for the unpaid purchase money, did not pass to the P. & D. R. R. Co. by the assignment to it by Short & Co. of the void contract.

4. The amount allowed by the Master is grossly excessive.

III.

Claims for moneys loaned by banks to the railway company within the said six months, which are alleged to have been used in payment for labor and supplies, amounting to $17,455.54.

In regard to this class of claims two questions will be discussed:

1. Money so loaned is not within the purview of the order of reference.

2. It is not within any rule heretofore claimed giving preference to labor and supplies.

IV.

Claim by Jesse M. Richards of $1,300 for drawbacks alleged to be due him under a contract with the railroad company, entitling him to such drawbacks on freight during said period of six months.

V.

Claims for stock killed, and which the Master states are allowed as "operating expenses" $324.50. Schedule D.

VI.

Claims by laborers now held by them, and claims for supplies held by the vendors:

Total claims for labor,.....$206,551.34
Total supply claims 94,597.36

VII.

Claims for labor and supplies purchased and held by others.

There are two classes of these claims:

1. Those purchased at the face value.

2. Those purchased at a discount: $27,367.73, (schedule B.), and $19,375.31 (special report on claims of F. A. W. Davis and others), making in all $46,743.04.

In addition to the general insistment we shall make in regard to all claims, we shall argue:

1. That the assignment does not carry with it any supposed lien, no mention having been made in the transfer of any such lien.

2. That if any allowance is made it can only be for the amount actually paid on such assignment and not for the face value of the claim.

These claims, except those under 1st and 2d sections, have been considered under the following clauses of the order of reference.

"To ascertain and report to the Court the evidence, together with their findings thereon, touching the true and just amount due upon each claim or petition presented to the Receiver, or to the Court for payment for labor, supplies and operating expenses performed for and furnished to said I., B. & W. Ry. Co., between the first day of June A. D. 1874, and the date of the commencement of said Receivership. Provided that each claim or petition so presented to the Receiver, or to the Court, shall state the exact date the indebtedness accrued, what the indebtedness accrued for, where the indebtedness accrued, and what amount thereof remains unpaid, and the claimant or petitioner shall make affidavit to the correctness of his said claim or petition.

"To ascertain and report to the Court the evidence,

together with their findings thereon, relative to the issue joined upon the intervening petition of F. A. W. Davis and others filed herein."

POINTS.

I.

It is now contended for these petitioners and claimants that these several sums, amounting in the aggregate to over a half million of dollars, are to be paid out of the proceeds of sale upon foreclosure in preference and prior to the bonds secured by the mortgages, which were duly recorded, and which record, by express statute, in both Illinois and Indiana, is full notice to all the world of their existence, and the effect of which record is to give the mortgagees a prior lien over all conveyances, judgment, lien and other encumbrances subsequently executed. Ill. Gen. Stat., (Gross), chap. 24, see. 19; Ind., act May 6, 1852—1 Blackf. 151.

The only statute in Illinois which it is claimed has any bearing is the following, which was approved April 3, 1872, and was in force July 1, 1872. (Rev. Stat. Ill., 1874, p. 671, 851):

"All persons who may have furnished, or shall hereafter furnish to any railroad corporation now existing, or hereafter to be organized under the laws of this State, any fuel, ties, material, supplies, or any other article or thing necessary for the construction, maintenance, operation or repair of such roads by contract with said corporation; or who shall have done or performed, or shall hereafter do or perform any work or labor for such construction, maintenance, operation or repair by like contract, shall be entitled to be paid for the same as

part of the current expenses of said road, and, in order to secure the same, shall have a lien upon all the property, real, personal and mixed, of said railroad corporation, as against such railroad and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles, or the commencement of said work or labor, provided suit shall be commenced within six months after such contractor or laborer shall have completed his contract with said railroad corporation, or after such labor shall have been performed or material furnished."

There is no statute in Indiana applicable.

1. None of these claims have been put in suit, or at least no suit was brought before November, 1875.

If it be said that the appointment of the Receiver prevented a suit, we reply that an application to the Court, either by intervening petition or for leave to sue the Receiver was open to the claimants, and that there was no injunction preventing suit against the corporation itself.

2. The liens created by the statute upon its requirements being fulfilled, are only paramount to liens of mortgages accruing *after* the commencement of the delivery of the work or the commencement of the work or labor.

The lien of the mortgages to the complainant accrued in 1869. The work and labor was performed and supplies were furnished in 1874.

3. Statutes creating liens of this nature are to be strictly construed, especially as regards *bona fide* purchasers, encumbrances and creditors.

Phillips on *Mechans. Liens, sections 18, 20. Morgan* v. *Cincinnati, 3 Wall, 275. Davis* v. *Alvord, 4 Otto, 545.*

Inasmuch as the construction of a statute of a State given by the Court of last resort of that State, is as binding on the Federal judiciary as if incorporated in the very words of the statute; (*7 Peters, 542. 2 Otto, 575. 3 Otto, 672. 2 Black., 599.* 5 *Wall., 433. 18 Wall., 71, 81*), the decisions of the Supreme Court of Illinois are of authority. That Court has held in regard to such statutes, that the party, seeking to enforce the privilege granted, must bring himself within the terms of the statute which is opposed to common right, and should be strictly construed (*Cook* v. *Heald, 21 Ill., 425*) and that these privileges conferred on mechanics, deriving their efficacy entirely from positive enactment, can not be carried beyond the extent of the grant, either as to place or party. (*Brady* v. *Anderson* 24 *Ill., 110*).

In *Stephens* v. *Holmes, 64 Ill., 336, Rothgerder* v. *Dupuy, Ibid., 453*, and *Huntington* v. *Bartno, Ibid., 502*, the Supreme Court held that mechanics' liens are in derogation of common right, confer special privileges and are not to be extended by liberal construction. The opinions in these three cases contain strong expressions of the necessity of strict construction of statutes of this kind.

In *Arbuckle* v. *Illinois Midland Railway Co., 81 Ill. 429*, a strict construction is put by the Supreme Court upon the act of February 22, 1861 (*Public Laws 142*), and the act of April 3, 1872 (*Sess. Laws, p. 279*), creating liens against railway companies.

4. Where a mortgage is recorded before the beginning of the work, the mortgagee has the prior lien. Where a mortgagee has placed his mortgage on record, his rights are then protected by law. In each case the lien of the mechanic is subordinate to that of the mortgagee, although the mortgagee knew of such work and labor at the time the mechanic rendered the same, and did not object.

The same principle applies in favor of mortgages recorded before the statutory notice. Thus where mechanics were required to record their liens, a mortgage recorded first has precedence. The rule of *caveat emptor* applies against a mechanic as well as in the case of a vendee. If a contractor proposes erecting buildings, furnishing materials, or putting labor on a lot of ground, it behooves him to examine and assure himself of the fact, that the person with whom he contemplates making the contract, or for whose benefit he is about to employ his means in labor, has such an interest or title unencumbered, as will enable him to avail himself of a valid or efficient lien. Under the system of registration in this country, a little diligence will always impart to a person the requisite information, and if he fails to inform himself, the law will not relieve him against the consequences of his own negligence.

Philips on Mech. Liens, sec. 232.

As the statute of each state fixes the time for the inception of the lien, it follows that whenever a notice of lien is made necessary for its creation, all transactions with *bona fide* purchasers, prior to strict compliance with the statutory requisites of notice, will be

effectual, even to the entire exclusion of the mechanic. *Philips on Mech. Liens, sec. 233. Homans* v. *Coombe, 3 Cranch, C. C. 365.*

5. In these cases at bar then, no claim *under the statute* can be supported against any one, because the suit was not brought during the time limited by the statute and the inchoate right of lien became utterly extinct, without any power of revival by any act either of the parties or of a court, and certainly no lien based on labor performed, or supplies furnished in 1874, can be upheld against the mortgage whose lien accrued by registration in 1869.

6. Some cases which have been cited as adverse to these principles, are when examined, not opposed to them.

Davis vs. *Bisland*, 18 *Wall*, 661; *Fox* vs. *Seal*, 22 *Wall*, 437, *and Taylor* vs. *Burlington, Cedar Rapids and Min. R'y Co.*, 9 *Chicago Legal News*, 329, were all decided upon a construction of the phraseology of the statutes of the several states; which either created a lien as of the time when the work was begun, or one which had precedence over every right that could be acquired under any mortgage made after the debt to the workmen had been incurred. In each case the mortgage had been executed after the date fixed by the statute for the inception of the lien.

7. If the act of April, 1872, is to be construed so as to defeat the prior right of the mortgage vested in 1869, then the act is unconstitutional and void. The result of such construction is to withdraw the property from the prior lien of the mortgage; to destroy a vested right

of property in the mortgagee; to take the property of one person and give it to another without compensation, and to impair the obligation of the contract.

A legislative, or even a constitutional enactment, which legitimately has this effect can not be upheld.

Cooley on Const. Lim. p. 32; 292.
Fletcher v. *Peck*, *6 Cranch.*, *87.*
Bronson v. *Kinzie*, *1 Howard*, *297.*
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Vose v. *Bronson*, 6 *Wall*, 456.
White v. *Hart*, 13 *Wall*, 646.
Gunn v. *Barry*, 15 *Wall.* 622.

II.

While the position that there is a statutory lien created in these and similar cases in favor of laborers and supply men is thus shown to be untenable, a distribution of the fund in the registry of a court of equity, arising upon a foreclosure of the prior registered mortgage in favor of such labor and supplymen, is attempted to be justified by an analogy to the statutes considered under point I.

No Power exists in any Court to adjudge such a Distribution.

1. The province of the court is *dicere legem non dare legem.* *Geyer* v. *Aquilar*, 1 *T. R.*, 696. *Peck* v. *Jenness*, 7 *How*, 612.

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2. A lien of this nature is the creature of statute law alone, and none can be implied, where the very words of a statute does not give it. *Phillips on Mechanics' Lien*, § 1–15. *Canal Co.* v. *Gordon*, 6 *Wall*, 561.

3. Circuit Courts of the United States have the jurisdiction and powers granted to them by the laws of the United States under the Federal Constitution and none others.

In Fontain v. Ravenal, 17 Howard, 384, Judge McLean says: "The Courts of the United States can not exercise any equity powers, except those conferred by acts of Congress and those judicial powers which the high Court of Chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised *at the time of the formation of the Constitution of the United States.*"

And Taney, C. J., in the same case says: "The 2d section of the 3d article of the Constitution declares that the judicial power of the United States shall extend to all cases in law and equity specified in the section. These words obviously confer judicial power and nothing more; and can not upon any fair construction, be held to embrace the prerogative powers, which the King, as *parens patriae*, in England, exercised through the courts. And the Chancery jurisdiction of the Courts of the United States, as granted by the Constitution, extends only to cases over which the Court of Chancery had jurisdiction, in its judicial character as a court of equity. The wide discretionary power which the Chancellor of England exercises over infants, lunatics, or idiots, or charities, has not been conferred."

"Notwithstanding Circuit Courts, by the judiciary act, were clothed with jurisdiction in all cases in equity, yet such jurisdiction must be executed within the limits prescribed by the organic law conferring the powers and confined to the cases and subjects defined."

Baker v. *Biddle*, *Baldwin*, *394*.

4. No such power was vested in the Court of Chancery of England at any time. Indeed liens of this nature are still unknown to English Jurisprudence.

"None (i. e. legislative enactments) were ever adopted and none to this day are to be found on the statute-books of Great Britain, securing in any manner to the mechanic or material-man a lien on the buildings their industry or capital have contributed to erect."

Phillips on Mechanics' Liens, § 1 *at end.*

"*Liens of this kind were unknown in the common law or equity jurisprudence both of England and of this country. When they exist in this country they are the creatures of local legislation.* They are governed in everything by the statutes under which they arise."

Canal Co. v. *Gordon*, 6 *Wall*, 561.

5. Is there any general principle of equity jurisprudence by which this new species of lien, ***namely***, "lien by analogy," can be justified?

It is of course conceded that there are liens recognized in equity, whose existence is not known or obligation enforced by law.

(1). These liens, however, arise very generally from constructive trusts—such as vendors liens in the land for the amount of the purchase money —liens created by deposit of title deeds on advance

of money—liens resulting to one joint owner of real estate from repairs or improvements made upon such property for the joint benefit; all of which arise from contract express or implied. Story on Equity Juris., § 1217–1236.

(2). So, too, "where the true owner of an estate, after the recovery thereof at law, from a *bona fide* possessor for a valuable consideration *without notice*, seeks an account in equity as plaintiff against such possessor for *the rents and profits*, it is the constant habit of courts of equity to allow such possessor as defendant to deduct *therefrom* the full amount of all the meliorations and improvements which he has beneficially made upon the estate and thus *to recoup* them from the rents and profits."

Bright *v.* Boyd, 1 Story, R., 478.

(3). "If the true owner stands by and suffers improvements to be made on an estate *without notice* of his title, he will not be permitted to enrich himself by the loss of another, but the improvements will constitute a lien on the estate."

Green *v.* Biddle, 8 Wheat. 1.

(4.) "But the courts have never enforced in a direct suit by the *bona fide possessor*, his claim to meliorations of the property, from which he has been evicted by the true owner."

Story, Equity Jurisprudence, § 799.

(5). It will be perceived that these cases last mentioned are only in favor of the *bona fide possessor*, of the property *without notice*. The mortgages in this case were duly recorded, and thus the claimants were not *bona fide* with-

out notice. They knew of the lien of the mortgages, or what is tantamount, should have known it. The record of the mortgage is good and effectual notice to all purchasers, mortgagees and creditors. These equitable liens repose on the doctrine of estoppel, but "It is essential for the application of the principle of equitable estoppel with respect to the title of *real property*, that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. When the condition of the title is known to both parties or both have the same means of ascertaining the truth, there can be no estoppel." *Brant* v. *Virginia Coal Co., 3 Otto, 326.*

A claim by purchasers from a mortgagor, that the mortgagee was estopped to set up his mortgage lien against them by reason of his failure to assert the lien during the making of certain improvements on the land by the purchasers was overruled. The mortgagor had a right to presume that the plaintiff had examined the records and no case could be found holding that a mortgagee whose mortgage was duly recorded, lost any right by neglecting to give personal notice to a purchaser from the mortgagors. The case was not analogous to the class of cases where one having the title to land himself, knows that another *ignorant* thereof, but believing himself to be the owner, is proceeding to erect improvements thereon, and the real owner conceals his title from him, or remains silent in relation thereto. *See opinion of* GROVER,

J. *in Rice* v. *Dewey*, 54 *Barb.*, 457. Bigelow on Estoppel, 452.

(6). It is believed that no equitable lien has ever been held to exist unless it was founded on contract expressed or implied, *or* was created by or resulted from some trust expressed or implied, *or* had grown out of the doctrine of estoppel, *or* resulted from breach of trust or fraud on the part of the person whose property is charged with the lien. To no one of these classes do any of these claims under consideration belong.

Moreover, this "lien by analogy" is repugnant to the fundamental principles of equity.

a. Priority in time in the absence of fraud always creates superiority of right.

"In the course of the administration of assets, Courts of Equity follow the same rules in regard to legal assets which are adopted by Courts of law; and give the same priority to the different classes of creditors, which is enjoyed at law; thus maintaining a practical exposition of the maxim *Æquitas sequiter legem.* In the like manner Courts of Equity recognize and enforce all antecedent liens, claims, charges *in rem*, existing upon the property according to their priorities; whether these charges are of a legal or of an equitable nature, and whether the assets are legal or equitable." Story Eq. Juris; § 553.

b. Equity follows the law in regard to the legal title to realty, except where fraud intervenes. Story, Eq. Juris., § 64.

c, Secret liens are not favored either by law or in equity. *See* 18 *Ill.* 519.

d. No equity arises from the fact, that the money of the claimant contributed to the improvement.

In Galveston vs. Cowdrey, 11 Wall, 465, Pulsford claimed under a deed of trust which provided that P. should have a special lien on a lot of railroad iron which was to be used for completing a portion of the track. It was contended that the company having became bankrupt and unable to finish the road, the work previously done had become worthless and the pledge given by the mortgagee was without value, and because his iron applied to the road saved it and rendered it capable of being used, which it would not have been otherwise, hence in the principle adopted by the civil and maritime laws of awarding priority to the last creditor who furnished necessary repairs and supplies to a vessel that he was entitled to priority in this case. The Supreme Court overruled this claim.

In Wright *v.* Ellison, 1 Wall, 16, it is said: "To constitute an equitable lien on a fund there must be some distinct appropriation of the fund by the debtor. It is not enough that the fund may have been created through the efforts or outlays of the party claiming the lien." *See also Dunham* v. *R. R. Co.*, 1 *Wall*, 254. *Dillon* v. *Barnard*, 1, *Holmes*, 386. *S. C. on Appeal*, 21 *Wall*, 430.

Vose v. *Bronson*, 6 *Wall*, 456.

d. Parties dealing with an estate, with notice actual or constructive, can not have the value of improvements deducted from the price at which the property is sold.

Green v. *Biddle*, 1 *Wheat*, 76.

Hughes v. *Ellett*, 9 *Wheat*, 500.

Butt v. *Ellett*, 19 *Wall*, 544.

III.

It is argued, that there being *a discretion* in the Chancellor to grant or refuse a Receivership, that the Court, if it grants one, may impose terms and conditions on the mortgagees seeking it.

It is true that some cases do say that the appointment of a Receiver is discretionary with the Court, to a considerable extent to be governed by a consideration of the circumstances of each case (High on Receivers, § 7). But this discretion of a Court of equity is a legal, not an arbitrary discretion. "There are certain principles on which Courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than Courts of law." *Cowper* v. *Cowper*, 2 *P. Wills.* 753.

This contention will lead to this practical result—that the bondholders must either have the Receivership denied and the mortgaged property left to be frittered away piecemeal under executions and be plundered or wasted by dishonest officials of the mortgagor corporation, or accept the Receivership, coupled under compulsion with arbitrary conditions, having no limit save the will, the conscience, the charity, or it may be the prejudices of the Chancellor. Once define "discretion" to mean the will of the Judge and all barriers are overthrown against the imposition of conditions which result in practical confiscation.

It is against such heresies as this that good Judges, while anxious to amplify their jurisdiction, yet unwill-

ing to do so at the expense of fundamental legal and constitutional principles, have uniformly protested. A doctrine more monstrous can hardly be conceived of. Courts do not make bargains for the granting of justice. They never refuse judgment to parties entitled to it, except upon their agreeing to terms not required by legal principles; neither do they grant judgments repugnant to such principles, upon the successful parties making stipulations as conditions for such judgment. Either the mortgagees are entitled to the Receivership on principle, or they are not. If they are so entitled it should be granted without condition. If they are not so entitled, no terms accepted by them will right the wrong committed in granting the Receivership.

"A very learned Judge in equity, in one of his ablest judgments, has put this matter in a very strong light, (Sir Joseph Jekyll, in Cowper *v.* Cowper, 2 P. Will., 753). The law is clear (said he), and Courts of Equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. And though proceedings in equity are said to be *secundum discretionem boni viri;* yet when it is asked, "*Vir bonus est quis?*" the answer is, "*Qui consulta patrem, qui leges juraque servat,*" and, as it is said in Rook's case (5 Rep. 99 b), that discretion is a science, not to act arbitrarily, according to men's wills, and private affections; so, that discretion, which is executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion, in some cases,

follows the law implicitly; in others, assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigor of it. But in no case does it contradict or overturn the ground or principles thereof, as has been sometimes ignorantly imputed to the Court. That is a discretionary power which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the Constitution intrusted with."

Story, Eq. Juris., § 13.

"If, indeed, a court of equity in England did possess the unbounded jurisdiction, which has been thus generally ascribed to it, of correcting, controlling, moderating and even superseding the law, and of enforcing all the rights, *as well as the charities arising from natural law and justice*, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitray power that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the judge, acting, if you please, *arbitrio boni judicis*, and it may be, *ex æquo et bono*, according to his own notions and conscience; but still acting with a despotic and sovereign authority. A court of chancery might then well deserve the spirited rebuke of Selden: For law we have a measure, and know what to trust to. Equity is according to the conscience of him that is Chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure the Chancellor's foot. What an uncertain measure would this be!

One Chancellor has a long foot; another a short foot; a third, an indifferent foot. It is the same thing with the Chancellor's conscience. * * * * * * * We might, indeed, under such circumstances, adopt the language of Mr. Justice Blackstone, and say: "In short, if a Court of equity in England did really act, as many ingenious writers have supposed it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case." Story Eq. Juris., § 19.

If the claims against which this argument is directed are to be upheld at all, it must be because of the power of the Court as to the distribution of the trust-fund. In this there can be no discretion. The claims of the several *cestuis que trustent* must be determined according to their legal rights. No question of hardness, of the equality of the burdens resting upon different creditors, can influence the Court. As the law fixes the order of the interests or liens, so must the distribution be made.

This disposes of this attempted lien "by compulsion."

IV.

We contend that Receiverships of railways should only be granted in cases of emergency and where the mortgagee shows either insolvency, fraud, waste, refusal to apply the income to payment of interest, or inadequate security. The modern idea of appointing a Receiver of a railway to operate it for an indefinite time is founded upon a mis-apprehension of the true function of such a Receivership, and only entails needless trouble and annoyance upon the Courts.

It is no part of the legitimate purpose of the possession of the Court of a railway to operate it in order to produce a fund to liquidate past indebtedness.

"Nothing is better settled than that the Court does not assume the management of a business or undertaking, except with a view to the winding up and sale of the business or undertaking. The management is an *ad interim* management; its necessity and justification spring out of the jurisdiction to liquidate and to sell; the business or undertaking is managed and continued in order that it may be sold as a going concern and with the sale the management ends."

Gardner v. *L. G. Ry. Co.*, *L. R*, 2, *Chan. Appeals.*

"The appointment of a Receiver by a Court to manage the affairs of a long line of railway, continued through five or six years, is one of those judicial powers, the exercise of which can only be justified by the pressure of absolute necessity."

R. R. Co. v. *Soutter*, 2 *Wall*, 510. *See Myers* v. *Johnson*, *Am. Law Times*, *April*, 1877. 17 *Vesey* 315, 323. *See opinion of Barrett*, *J.*, *in Vermont Central R. R. Co. Case.*

V.

It is said that the maxim, "he that seeks equity must do equity" will support these claims. The answer to this is that this rule applies only in the case where the party against whom it is invoked is seeking relief in character of a plaintiff in Court.

Story Eq. Juris., § 64.

This argument is well answered by Cofer J., in his opinion in *Douglass* v. *Cline*, 3 *Central Law J.*, 670.

"But it is said the appellants seek equity, and accord-

ing to the approved maxim, that "he who seeks equity must do equity;" it was not inequitable to give the appellees the fruits secured by the vigilance of the appellants by the use of their own remedy at their own expense, and that, too, although the appellants, according to the authorities I have quoted, have a specific lien on the earnings in the Receiver's hands, and, as held by the majority of this Court, an equitable lien which must prevail over all others who do not make out a superior claim. I am not aware that this most excellent maxim has ever before been applied to a case like this. It is not pretended that the appellants owed any equity to the mortgagor. The company was in no condition to invoke the maxim or to ask lenience at the hands of the Chancellor. It had violated every important stipulation in the mortgages; had misapplied the earnings; had failed to pay current interest; had allowed state and municipal taxes assessed against it to be in arrears; the road to be out of repair; and by failing to pay its employes had excited them to mutiny, threatening the destruction of the road. They owed the appellees no equity. They neither employed them nor promised to pay them, *and some of the appellees who have been ordered to be paid are the President and the other officers of the unfaithful corporation, who may be presumed to be responsible for the mismanagement not to say bad faith, which led to the wholesale violation of the covenants in the mortgages to which I have referred.* As therefore the appellants owed no equity to the corporation, or to the appellees, the effect of the application in this case of the maxin: "He who seeks equity must do equity" is, that

if A asks the intervention of the Chancellor in his behalf against B, the Chancellor may, as the conditions upon which he will grant the relief asked, require A to render to C an equity due from him to B. In other words, and to apply the principle announced to the case in hand, the company owes to the appellants and the appellees each a debt. It has given the appellants mortgages upon its property to secure the debts due to them, but the appellees have no lien, have no such remedy. The appellants brought their suit, manifested their right, and sought and obtained their remedy; and then it is said that they have no right to complain of the appropriation of those earnings which they intercepted, and which the appellees could never have reached, to pay the appellees' debts. I always supposed that the maxim in question meant that a party seeking the aid of equity must do equity to him against whom he seeks relief in reference to the subject matter involved in the litigation, and that it does not mean that he must do equity to all the world besides, and especially that it does not mean that a plaintiff seeking equity must answer for an equity not due from him, but due from his adversary to a third person. If A has an unfair advantage of B, and comes into equity for relief against B respecting the matter to which such advantage appertains, the Chancellor will apply the maxim and compel A to relinquish his unjust advantage, or if he refuses, will turn him out as unworthy of the aid of a Court of conscience. But if, instead of having that advantage of B, against whom he seeks relief, he has it of C against whom he seeks no relief, it

will hardly do to say that A can be denied relief unless he will do equity to C. Yet that case would be far stronger than this. The appellants have no unfair advantage of any one, unless, indeed, the taking of a mortgage security is to be held an unfair advantage of subsequent credits with notice. The appellants owe appellees nothing and seek no relief against them, and the equity the appellees have is no greater than that which all unsecured creditors have to be paid out of the rents and profits of mortgaged property in the hands of a Receiver pending proceedings to enforce the lien of the mortgage."

VI.

"No equitable lien arises from the fact that the claim is in conformity with principles of natural justice and equity."

(1). "There are many principles of natural equity and justice which are not attempted to be enforced within the jurisdiction of courts of equity."

Howe v. *Shepherd*, 2 *Sumn.*, 409.

"It would be a great hardship upon the appellees to lose the wages due them for their sweat and toil, but *hardships never create equities.* The Chancellor is not a dispenser of grace."

He is bound to recognize the legal, the equitable and the contract rights of suitors. He must be governed by principle and dare not yield to the promptings of sympathy and warp the rules established by a long line of precedents to do what seems to him equitable, unless he can base his decision upon principles which will establish the case as an exception to general rules. The mere discretion of a Court, however learned, wise and virtuous, unless that discretion be guarded by principles that

may be tested, understood and followed, is a power too dangerous to the contract rights of citizens to be allowed to occupy a place in the temple of justice. "That law is best which leaves as little as possible to the mere discretion of the Judge" is one of Lord Bacon's wisest aphorisms. Courts dare not undertake to do, in defiance of the rules of law, what the individuals composing them may regard as abstract justice. When we speak of the administration of justice we do not mean justice in the abstract, justice according to the refinements of the mere casuist, but justice according to law." *Cofer, J., in Douglas vs. Cline.*

(2) *Bona fide incumbrancers and purchasers are entitled to equal protection with the mechanic.* A mortgage had been given and duly recorded, and a mechanic claimed priority. It was adjudged that when a party claimed the benefit of the lien, he must show that he has strictly complied with all the prerequisites of the law, the aid of which he invokes, and however just and equitable may be its operations between the owner and the mechanic, care must be taken not to extend it beyond its legitimate scope to the prejudice of third persons, who have no means of knowing of the existence of such incumbrances, save as the statute points out. (Phillips on Mech. Liens, § 20, 232.

(3) There is no *moral obligation* which requires the mortgagees to assent to the priority asked for in regard to these claims. Thus it was held in *Bolton* v. *Johns*, 5 Penn., 145, that there is no moral obligation on a purchaser to liquidate a claim, even with actual notice of its existence, which on its face was no lien at the time of his purchase.

VII.

It is submitted that the practice against which this argument is directed would never have been tolerated, although founded on consent, had not confusion arisen between the duties of the Court in the management of the property in which there is a wide field for discretion, and its duties in the distribution of the sale proceeds, or the income proceeds, in which discretion has no place.

We propose, therefore, to state our views as to the relation which Courts sustain toward this kind of property when taken into the hands of a Receiver.

(1)

The Court in taking charge of the property and in managing and selling it and distributing the sale proceeds; acts for the trustee in the mortgage, and, in the stead of and for the benefit of such trustee enters and takes possession of the mortgaged property.

Am. Bridge Co. *v.* Heidelbach, 4 Otto, 800.

Gilman *v.* Tel. Co., 1 Otto, 616.

Galveston *v.* Cowdrey, 11 Wall, 482.

High on Receivers, § *688*.

The Court in the execution of such trusts is bound by the principles governing ordinary trustees.

(2)

The *cestuis que trustent* for whom the Court holds the property, are the holders of the bonds, secured by the mortgage in the first place; and in a secondary sense the mortgagor and others interested in the property.

Its duties to the different classes of *cestuis que trustent* are different. As to the holders of the bonds secured by mortgage under foreclosure, the duty is an active one—to do all that is proper to make the property repay the debt. Its duty to all others is rather passive—to refrain from doing that which unnecessarily injures them. The most liberal rule which can be claimed is, that the Court holds the trust estate for the benefit of all who are interested in the property in the order of the priority of their claims upon it, as established by law.

As to all parties it can count as items of expenditure only such payments as are made to benefit the property. It has in its capacity of trustee duties to none of these parties, except, as they grow out of the legal condition of the property.

It must determine what the property is which comes into its hands. It must make expenditures only to protect, improve, and make productive this property, whatever it is. It can not change the character of the estate by virtue of its possession as Trustee, nor encumber it except for purposes of preservation.

(3)

The Court in its capacity as trustee has two distinct classes of duties:

First. To manage the trust-estate so that it may produce the largest return.

Second. After the property has been sold, to distribute the proceeds of the sale among the several classes of *cestuis que trustent* according to their relative legal rights.

Under the first class comes the duty to operate the road, and the correlative right to incur debts for operation and preservation, which shall be entitled to first payment from the fund; to make repairs, to buy or hire rolling stock, employ laborers and agents, etc., etc. In this the Court, as trustee, has the right and indeed the duty to exercise a liberal discretion.

Under the second class comes the duty to determine the order in which the net proceeds of the property shall be distributed. By net proceeds, is meant the proceeds after deducting payments made on account of the expense incurred by the Court in the management of the trust, including Receiver's expenses and costs of the Court.

In the distribution of such net proceeds, the Court can exercise no discretion. It must follow the legal rights of the different classes of *cestuis que trustent*, as they stand in relation to one another.

The money must be distributed according to the priorities as they exist under the law. The Court can not in its discretion create priorities or liens in conflict with, or independent of the legal rights of the parties as they stood when it took possession.

This distinction is deemed important as answering the erroneous argument derived from confusing the two classes of duties of the Court.

(4)

The income of the property during the Receivership is subject to the same rules as to its management and distribution, as the property itself. There is, in respect

to the income, discretion to be exercised in seeking to create or increase it; no discretion as to its distribution. Or in other words, the property and its accretions constitute but one whole, making the trust estate.

The mortgage gives the trustee the right in case of condition broken, to take the management of the property and apply the income to the mortgage debt, instead of allowing the income to be disposed of by the mortgagor. Until the mortgagee enters the income is free; but after entry it is seized upon to be applied to the mortgage debt.

Galveston R. R. v. *Cowdrey*, *11 Wall*, *459*.

Gilman v. *Tel. Co.*, *1 Otto*, *616*.

Bridge Co. v. *Heidelback*, *4 Otto*, *800*.

It is true that until such entry by the Trustee or by the Court in its behalf, other creditors of the road have a right to such income as creating a fund from which their claims may be paid, provided they take steps to see that the Company so apply it; but not afterwards or otherwise. A lien upon the income, is created by the mortgage. The date of its inception is the date of the mortgage, or as to parties not having actual notice of the mortgage, the date of the recording of the same; but the lien does not become perfect until entry. From the date of the mortgage the lien exists, to be perfected at once upon entry, according to the terms of the mortgage. After entry the lien upon the income is as full and complete as that upon the land itself with its appurtenances.

While this rule that the income before the entry may be applied by the mortgagor without interference from or reclamation by the mortgagee may save the rights

of material, men and laborers to have such income in the hands of the Company applied for their benefit, it does not imply or grant the right to charge such or any other debts of the Company on the *corpus* of the estate; or on the net income after entry or receivership, or to claim from the fund arising from the sale under foreclosure, payments which, with due diligence, might have been collected from net income received by the Railway Company.

(5)

Payments for past labor and supplies can not be upheld as coming under the first class of duties and powers —those in respect to management, protection and improvement of the property.

It can hardly be said that the trust estate will be benefited by paying money for labor whose results have already been accomplished, or for materials, supplies or equipments, already a part of the property held by the Court in its capacity as trustee.

It may be a question whether it is fair, or whether it is not hard, that parties should not be paid for that which has already gone to increase or improve the trust property. But it is not to be doubted that the trust estate will not be benefited by paying from it for that which it already has in possession.

VIII.

Suppose that these claims should have matured into judgment, it would of course be conceded that the judgment creditor had no greater rights against the mortgagees than the judgment debtor.

Freeman on Judgments, §356.

Brown *v.* Pierce, 7 *Wall*, 205.

Baker *v.* Morton, 12 Wall, 150.

If then a judgment creditor claiming as he must under the mortgagor, and being thus "in privity with the R. R. Co., and bound by the estoppel created by the mortgage to the complainants," (11 Wall, 559,) has no lien, *a fortiori* a simple contract creditor claiming in like manner under the mortgagor must be equally bound by the estoppel, unless some fraud exists which is not charged in this case.

IX.

After acquired property of all kinds *eo instanter* becomes subject to the mortgage on conveyance or acquisition.

Pullam v. *Air Line R. R.*, 5 *Bissell*, 237.

Scott v. *R. R. Co.*, 6 *Bissell*, 535.

Pennock v. *Coe*, 23 *Howard*, 117.

Minnesota Co. v. *St. Paul Co.*, 2 *Wall*, 635.

Galveston v. *Cowdrey*, 11 *Wall*, 482.

X.

The same rules prevail as to railroad mortgages that apply to other mortgages.

Dunham v. *R. R. Co.*, 1 *Wall*, 234; *Denniston* v. *R. R. Co.*, 4 *Bissell*, 461.

XI.

Assignment of debt without mention of lien destroys it.

Moser v. *Meech*, 80 *Ill.*, 99.

C. & V. R. R. Co. v. *Fackney*, 78 *Ills.*, 116.
Rollins v. *Cross*, 45 *N.* Y., 771.

XII.

This is the first case, where these claims have been allowed, except on consent. No case has come to attention where the question seriously was litigated or solemnly argued.

Precedents founded on consent decrees establish no general rule of law or practice, binding upon courts. Upon this subject Mr. O'Conor in his brief (Curtis *vs.* Leavitt), says: "Points which pass *sub silentio* are not to be regarded as having been adjudged"—citing 2 Johns., 36; Burr., 2546; Corning *vs.* McCullough, 1 Comst., 75; Peopls *vs.* Corning, 2 Comst., 15; Riley So. Car. R., 111; 2 Phillips, 738. And if there appears to be any arrangement to glide over the points without debate, there is still a stronger reason presented for considering them open. Fletcher *v.* Peck, 6 Cranch, 147, last paragraph. Butler *v.* Van Wyck, 1 Hill, 416."

Comstock, C. J., says: in Curtis *v.* Leavitt, 15 N. Y., p. 15, that he felt himself at liberty, when necessary, to inquire whether a doctrine, which appeared to him to be plainly erroneous, is irreversibly settled by a decision where the point was neither argued by counsel nor considered by the court.

Judge Bronson, in Butler *vs.* Van Wyck, 1 Hill, 461, remarks: "*I find in the printed brief on the part of the defendant in error admissions which would not be very likely to come from counsel whose client was deeply interested to uphold the judgment which was*

reversed. I notice, also, that some of the arguments which might very well have been pressed upon the consideration of the court, were either very lightly touched, or entirely overlooked. I mention these things because the weight of a judicial decision may depend in a considerable degree upon the aid which the court received from the discussions at the bar. No man can feel entirely sure in his conclusions until the subject has been viewed in all its various aspects."

See Cochrane vs. Decner (6 C. L. J. *26*). ***Gaines vs. Relf, 12 How.,*** *472.*

XIII.

(1) It is said "that under the mortgages until action by trustees upon the company's default, or until this Court through its Receiver, assumed the administration of the property, the company remained in possession, *operating the road for the benefit of the bondholders who were to have the net income.* The company, its stockholders and directors had thus a trust to discharge to the public and *a trust to the bondholders.*"

Is this accurate? Does a mortgagor company operate the road for the benefit of the bondholder, secured by the mortgage? Have the bondholders an absolute lien on the net income before entry or the appointment of the Receiver?

"Upon the default which occurred, the mortgagees had the option to take personal possession of the mortgagee premises or file a bill, have a Receiver appointed, and possession declared to him. In either case the income would thereafter be their's. *Until one or the other*

was done*, the mortgagor, as Lord Mansfield said in Chinnery *v.* Black, 3 Douglass, 391, "was owner to all the world, and entitled to all the profit made." *Bridge Co.* v. *Heidelbach*, *4 Otto*, *800.

"A mortgagor of real estate is not liable for rent while in possession. 2 Kent's Com., 172. He contracts to pay interest and not rent. In Chinnery *v.* Black, 3 Doug., 391, the mortgagor of a ship sued for freight earned after the mortgage was given but unpaid. Lord Mansfield said: Until the mortgagee takes possession the mortgagor is owner to all the world and is entitled to all the profit made. It is clearly implied in these mortgages that the Railroad Company should hold possession and receive the earnings until the mortgagees should take possession, or the proper judicial authority should interfere. Possession draws after it the right to receive and apply the income. Without this the road could not be operated and no profit could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road will not be questioned. The amount to be so applied was within the discretion of the Company. The same discretion extended to the surplus. It was for the Company to decide what should be done with it. In this condition of things, the whole fund belonged to the Company, and was subject to its control. It was therefore liable to the creditors of the Company as if the mortgages did not exist. They, in no wise, affected it. If the mortgagees were not satisfied they had the remedy in their own hands, and could at any moment invoke the aid of the law or interpose them-

selves without it. They did neither. In Galveston Railroad *v* Cowdrey, 11 Wall, 459, substantially the same question arose as that we are considering. The mortgage there contained provisions touching the income of the road similar to those in the mortgages before us. This Court held, that, at least until after a regular demand was made, those who received the earnings were not bound to account for them. See also The City of Bath *v.* Miller, 51 Me., 341; Noyes, Receiver, *v* Rich, 52 id., 115. Upon both reason and authority, we think the appellants have no right to the fund in controversy."

Gilman v. Telegraph Co., 1 *Otto*, 616, 617.

(2) Again it said "practically it is usual for bondholders, either through representatives in the board or otherwise to dictate and control the policy and management of the company and the railroad."

Is this true? Is there any proof that the bondholders had any representatives in the Board of Directors of the Railroad Company? Is there any proof that the bondholders dictated or controlled the policy and management of the Company and the Railroad? No one could act for the bondholders but their trustee, the Farmers' Loan and Trust Company, and it is not contended that either it or its officers had any thing to do with the management of the railway company. In connection with this it is added that "the bondholders have the best opportunities to ascertain the exact financial condition of the company—its debts and obligations—from time to time; a position of advantage that men furnishing labor, cars and supplies do not occupy."

What shall be said of this argument as to the Western Car Company, when the evidence is considered which

shows that the affairs of the Railroad Company and the Western Car Company were identical:

Railroad Co.	Western Car Co.
B. E. Smith, President.	B. E. Smith, President.
C. W. Smith, Gen. Man.	C. W. Smith, Gen. Agt.
C. R. Griggs, Vice Pres't.	C. R. Griggs, Associate.
W. H. Smith, Director.	W. H. Smith, "
Wm. Denison, "	Wm. Denison, "

Did this Car Company not have "the best opportunity to ascertain the exact financial condition of the Railroad Company"? Did it not have "a position of advantage which was not occupied" by the bondholder?

As regards both the Car Company and the supply men and the laborers, they knew, or could have known if they had enquired (as in prudent men they ought to have done), the financial condition of the company. The condition of the account of the Car Company shows that their car rental had fallen in arrear for many months. The Car Company claims that over $200,000, was due them prior to June 1, 1874. The pay-roll had been in arrear for a considerable period prior to July 1, 1864.

(3.) An argument is sought to be drawn from the fact, that although the interest was defaulted on second mortgage July 1, 1874, on D., U., B. & P. and on consolidation mortgage October 1, 1874, and the bondholders, or their Trustee, did not enter into possession, or have a Receiver appointed until November 18, 1874. This was under the omnibus bill. The Trustee filed cross-bill February 2, 1875, and had the Receiver extended under cross-bill.

A reference to the mortgages will dispose of this so far as "ENTRY" is concerned. The Trustee has no power to enter until after six months after default, and before the six months expired the property was in the hands of the Receiver, and an attempt to enter would have been a contempt.

So far as beginning a suit to foreclose is concerned, the Trust Company exercised due diligence. The principal did not become due for failure to pay interest until after six months' demand and default. These provisions are not favored by Courts as being in the nature of penalties (Story Eq. Juris., § 1219), and there can be no *laches* where as under these instruments binding on company, creditors and bondholders alike, action by the bondholders is a prerequisite to the action of the Trustee, and where the *cestuis que trustent* are numerous.

(4.) Again it is said that "The bondholders are estopped to deny the authority of the *officers* of the company as *agents* for themselves." But per Marshall, C. J., *in Bank of U. S.* v. *Dandrige*, 12 *Wheat.*, 113, "the President and Directors, though elected by the stockholders, are constituted the agents of the corporation, not of the stockholders, and derive all their authority from the act or charter. The management and direction of the affairs of the institution are committed to them by the express terms of the act of incorporation. They are thereby made the representatives of it, and they also have the power to manage its concerns, and are left without control to exercise their own best discretion in doing so. The stockholders therefore have no absolute right to interfere directly with, and to exercise any immediate

control over, the Directors in the management of its affairs." *Dana* v. *Bank of U. S.*, 5 *W. and S.*, 247.

If the Directors *elected by the stockholders* are not the agents of *the stockholders*, with what show of reason can Directors be said to be the agents of *bondholders* who had no voice in their election?

XIV.

An examination of cases touching this subject will show that there is no judgment in an litigated case which will support the particular claims now before this Court.

(1) *Duncan* v. *Chesapeake and Ohio R. R. Co.*, 3 *Cent. L. J.*, 579, in Richmond, Virginia, County Court, came up on the report of a Receiver asking for instruction as to the surplus earnings of the railroad, and requesting to be allowed to discharge the arrears of pay due employes prior to his appointment as Receiver. The Court state, that as to the creditors of the Virginia Central Railroad Company, which were paramount, the franchises and property are abundantly sufficient to satisfy these creditors, and as to the bondholders of the Chesapeake and Ohio Railroad Company, who were the only parties, who could be ultimately affected by the payment of past labor claims, their assent was given to the entry of the order authorizing the Receiver to satisfy these claims.

(2.) *Douglas* v. *Cline*, *Court of Appeals of Kentucky*, *Sept.* 1876, 3 *Cent. L. J.*, 659, 673, was an application for payment of wages of employes for work performed after default in payment of interest *out of surplus fund which had accrued from the management of Receiver*

appointed by the Court. The decision of the majority of the Court is based upon the supposed right of the Chancellor to impose conditions upon granting a Receivership. This insistment, it is submitted, is successfully controverted in the able dissenting opinion by Judge Cofer.

(3). *In Duncan* v. *Mobile & Ohio R. R. Co.*, 2 *Woods*, 545, the Master reported in favor of paying the floating debt creditors; the Court however said that it was without any power to make decree recommended by the report. To undertake to do it would be to invade the legal rights of the bondholders, and if established, as within the power of a Court of equity, would shake the credit of railroad securities throughout the world.

(4). *In Denniston* v. *R. R. Co.*, 4 *Biss.*, 415, the Court say, "Here were large mortgages upon this Railroad which had become hopelessly insolvent. Application was made to the Court to put it in the hands of a Receiver in order that it might be operated for the payment of these mortgages. It was so done. It remained in the hands of the Receiver for some years. Subsequently other creditors applied to the Court, it being manifest that the mortgages could not be paid that way, or at any rate that the time would be so long that it was desirable for the interests of all that the administration of the road should be changed. They asked the Court to order the property to be sold so that the parties in interest might realize upon their claims. It was accordingly sold and the fund arising from the sale came under the control of the Court. Now what equitable lien had these petitioners on

that fund? None. Why? Because those who had prior liens came in and swept it away, and, more than that, have not perhaps been half paid. It is precisely like the case of a man who furnishes to the owner of a farm the means of carrying it on, but there is another party who has a lien upon the farm, and it is sold in order that the party who has the prior lien may be paid. Now, the fact that the mechanic or laborer has furnished the means of carrying on the farm would not authorize him to come into a Court of Equity and cut off the prior lien which exists on the farm and prevent it from being paid. These parties ought to be paid. They have a just claim against the road. But it is against an insolvent corporation, and they ask parties who have a prior right and lien, to pay them, because those with whom they have dealt can not do so. Upon general principles I hold what I have always held in all cases of this kind, that the party who has the prior lien is entitled to the preference, and this preference must prevail as against all except specific liens, and these, of course, have to be paid in their order."

(5.) In Scott *v.* Clinton and Springfield Railroad Company, 6 Bissell, 535, the Court say:

"It is true, that we have, as a sort of necessity of the case, and yielding to some extent to the statutes of this state, where supplies and materials have been furnished to a railroad *and the diligence required by the statute*, has been used by the creditors to enforce their claims within six months, allowed the payment of those claims which perhaps is stretching the principle referred to as decided by the Supreme Court beyond its legitimate operation.'

XV.

It is insisted that the complainants are estopped from now questioning the correctness of the original order, directing the Receiver to discharge out of net income, after paying taxes, the labor and supply claims, because the complainants had the Receivership extended, so as to protect their rights as mortgagees, and did not object to the provision of the original order, and by certain orders and agreements are now prevented from attacking the original order.

We reply, (1.) That there was no estoppel, because it can not be said that the Car Company lost anything by reason of this assumed state of facts; and (2.) as appears by the notes of Mr. Harrington's agreement at Chicago, May, 1877, pp. 40, 41, the order was protested against by the complainants, and a motion was made to vacate it.

See as to the law the opinion of Judge Cofer, p. 677, and cases cited.

XVI.

The claims should be disallowed and the complainant's exceptions sustained.

ASHBEL GREEN,
R. E. WILLIAMS,
J. AUG. JOHNSON,
Of Counsel for the Farmers' Loan and Trust Company, Complainants.

FEBRUARY 22, 1878.

The total amount allowed by the Master is	$501,624.95

———:o:———

Which is classified by the Master as follows:

Labor and supplies, ...	377,248.85
Western Car Co. rental 1072 box cars for six months at $15 per month, and 100 coal cars at $15 per month, . . .	105,480.00
Paris & Danville R. R. Co., Right of Way,	17,262.00
Drawbacks on Freight, . . .	1,352.60
Stock killed, ...	281.50
Total allowed, . . .	$501,624.95

———:o:———

In addition to the above amounts the Master has reported without recommendation whether they should be allowed or disallowed,

Lawyers Fees, ...	6,033.88
Salary of President and Vice President,	3,186.77
Total, ...	9,220.65

———:o:———

The Masters have classified among Labor and Supplies the following claims:

Moneys Loaned by Bankers,. . .	$17,455.54
Labor claims assigned at a discount. . .	46,743.04
Labor claims assigned without evidence whether at a discount or not, . .	4,022.69

———:o:———

In addition to the above assigned claims others are held by assignees, the amount of which can be ascertained by the clerk.

Financial Condition of Receivership, as of Nov. 30, 1877.

Liabilities.

Accounts due per balance sheet	$201,868.00
Receiver's certificates outstanding, as per balance sheet	192,425.00
Masters' award to Rogers Locomotive works	167,618.00
Rogers' claim for rent 16 engines, in 1876	10,000.00
Western Car Co., claim for balance on rentals in 1875	40,000.00
Taxes unpaid, from 1873 to 1877 (1877 estimated)	200,393.00
	$812,304.00

Available Assets.

Materials on hand, per balance sheet	$48,636.19	
Cashier and Pay-master, "	73,523,23	
Local agents and conductors, "	21,755.35	
United States Express Co., "	107.00	
U. S. Postoffice Department, "	4,394.43	
Due from other roads and individuals, per balance sheet	47,168.19	$195,584.39
Net Deficiency or debt, Nov. 30, 1877		$616,719.61

———:o:———

Betterments claimed by Receiver—page 8.

Extraordinary Repairs	$455,036.02
New work	22,856.89
Right of way	35,076.22
New equipment	121,560.63
Total	$634,529.76

Income Account from Receiver's Report of 30th November, 1877.

Earnings from all sources for three years (page 7)		$4,176,587.50
Operating expenses, three years,	$3,122,560.77	
Rentals, " "	568,197.83	3,690,758.60
Surplus or net earnings from three years' operations		$485,828.90

The following items, chargeable to operating expenses, are not included in the above statement, and should be deducted from net earnings:

Masters' award to Rogers Locomotive Works	167,618.00	
Rogers' claim for rent, 16 Engines, in 1876	10,000.00	
Western Car Co., claim for balance on rentals in 1875	40,000.00	
Taxes paid but not yet entered (page 2)	41,703.26	
Taxes unpaid from 1873 to 1877 (1877 estimated)	$200,393.00	459,714.26
Apparent balance		$26,114.64

———:o:———

Receiver's certificates oustanding Nov. 30, 1877 . . $192,425.00

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———:o:———

Receiver's certificates oustanding Nov. 30, 1877 . . $192,425.00

Actual Money Expended in Building and Equipping Road.

Bonds, Main Line	$5,750,000.00
" Extension	2,250.000.00
Town contributions	800.000.00
	$8,800.000.00

—:o:—

Deficit Income Account.

1872	$610,127.29
1873	314,783.80
1874	665,780.10

See Exhibit 5.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF ILLINOIS, AND DISTRICT OF INDIANA.

MALCOLM C. TURNER, ET AL.
vs.
INDIANAPOLIS, BLOOMINGTON & WESTERN RAILWAY CO., ET AL.

Intervening Petition of the Paris and Danville R. R. Co

One of the claims allowed by the Master, is in favor of the Paris and Danville Railroad Company, for right of way; the amount allowed is $17,262.00. This claim stands on an entirely different basis from any other in the list, as we presume it will not be contended that it can be brought within the category of labor or supplies, or any other definition, however broad, of the phrase, "operating expenses." In order to understand this claim, it will be necessary to give a brief history of its origin. On the 25th of May, 1869, John C. Short, (then being one of the Directors of the D., U., B. & P. Co.), Sandusky, and Gundy, composing the firm of John C. Short & Co., were the owners of a considerable quantity of land in and contiguous to the town of Danville, Illinois, through which the D., U, B. & P. Railroad was then about to be built, crossing over the land of Short & Co. On that day Short & Company and the Railroad Company entered into a contract, in writing, the terms

of which were, in brief, these: That the Railroad Company agreed to receive from Short & Co., all the coal it should need for all purposes, between the city of Bloomington, and the town of Danville, both inclusive, being a distance of about eighty miles, for which the Railroad Company were to pay Short & Co., all the expenses of mining the coal and placing it on the cars, and an additional sum of seventy cents per ton; the contract setting forth what should be included in the expenses of mining, in consideration of which Short & Co., agreed to furnish the Railroad Company all the coal it should need on that portion of its line, on the said terms; and, in further consideration that Short & Co.. agreed to donate to the Railroad Company, a right of way over their lands, of about two miles, and ground for a depot near Danville, and in further consideration that Short should give the right of way to the Company, over his lands and lots in the town of Danville, and to encourage the mining of coal, and the transportation of same over the railroad; the Railroad Company agreed to furnish Short & Co. not less than twenty cars a day, if they needed so many, for the transportation of coal from the mines, and to haul it at the minimum average rate for which coal was transported by other railroads in Illinois, during the time; the contract was to last during the term of ten years, with the privilege of renewal for a like term of ten years on its termination, at the option of Short & Co., but, in the extended time, the rate to be paid by the Railroad Company, for coal used by it, was to be the average market price; such coal as was taken by the Railroad Company, was

to be paid for monthly. Contemporaneously with the making of this contract Short & Co. conveyed to the Railroad Company, by an ordinary deed, the right of way through their lands, covering about twenty-three acres and a tract containing about seven acres, which was intended to be used for depot purposes; and afterwards, Short made a deed for an express consideration of twenty-nine hundred dollars, for a right of way over the town lots in Danville.

On the 1st day of August, 1870, the I., B. & W. Railroad Company and Short & Co., entered into another written contract which recited the above contract by which it was agreed that the first contract should be extended for a period of ten years after September 1, 1880, and that the Railroad Company should take all its coal from Short & Co., under the terms of the original contract, over the portion of its line from Danville to Indianapolis, both inclusive, for the entire term of the old and the extended contract, and should build and maintain for Short & Co., a switch track from the railroad to their mines, in such a way as to make it the most convenient to load coal from the mines on said track; and to receive all coal intended for shipment, or for the use of the Railroad Company, at the mouth of the mine, and to haul the coal to and from the mine free of charge, and to furnish Short & Co., an additional twenty cars a day, if needed, provided they had rolling stock sufficient. By a contract of about the same date, Short & Co., agreed to pay to C. R. Griggs, one of the Directors of the I., B. & W. Railroad Company, for the use of himself and the other Directors of his Company twenty

cents per ton, out of the seventy cents, agreed to be paid by the Railroad Company, to Short & Co., for coal used by the Railroad Company; this last contract was subsequently assigned over to the Railroad Co. And the evidence shows that whatever had been paid to the Directors on this contract, had been afterwards paid over to the Railroad Company. Short & Co., afterwards conveyed the land, through which the railroad runs, by Deed, to the Paris & Danville Railroad Co., after the railroad had been built, and was in the occupancy of its right of way. The deed from Short & Co. to the Paris & Danville Railroad Company, expressly reserves the rights of the I., B & W. Railroad Company. The deeds from Short & Co. and Short to the D, U., B. & P. Co., for the right of way and depot grounds, were in fee. Short & Co, also assigned, by an ordinary endorsement in blank, the two contracts, and delivered them to the Paris and Danville Railroad Company. Subsequently, James A. Eads, the petitioner, was appointed Receiver of the P. & D. Railroad Company, and filed an intervening petition in this case, setting up these contracts, and asking the Court to compel Wright, the Receiver of the I., B. & W. Co, to specifically execute the same. On the main hearing of this case the Court held the contracts to be void as against public policy, but directed the petition of Eads to be referred, with the other intervening petitions to the special Master, to take evidence and report his findings. Among other things the Master reported Eads was entitled to the amount mentioned in question for right of way, supporting his finding upon the ground, that the

only consideration for the right of way, having been the contracts, and they having been annulled by the Court, Eads had an equity against the Railroad Company, to recover the reasonable value of the right of way at the time of its conveyance, and found the value to be the sum already stated.

The original deed from Short & Co., for the twenty-three acres and seven acres, was lost, without having been recorded, and, on the day of on the application of Wright, Receiver of the I., B. & W., to Short & Co, they made a new deed to supply the place of the lost one, which deed recites the making and delivery of the original deed, as above stated, and its loss, and that the new deed was made to supply its place.

John C Short, is now and has been from its organization, the President of the Paris & Danville Company.

Our exceptions to this part of the report are,

1. That nothing could be allowed for this right of way, and

2. If anything could be allowed, the finding of the Master is grossly excessive, and not warranted by the evidence.

As your honors have been furnished with an abstract of the evidence of value upon which the finding is based, and as that question has been gone into fully, on the oral argument, we will not further argue it here, except to say that we assert with great confidence that we regard the amount found as grossly excessive and totally unwarranted by the evidence.

On the first exception we present the following points:

1st. We say the petitioner has no standing in Court, the property lies within the State of Illinois, and is to be governed by Illinois law, and in presenting our views, we do not deem it necessary to extend our researches beyond the decisions of that State; as the principles involved in the decision of the case, in our view are well settled, and have long been rules of property in that State. It is conceded that the fee passed to the Railorad Company, and that the consideration for the deeds was the making of the contract by the Railroad Company. This is not an application to a Court of Chancery to rescind the deeds, and to divest the Company of the title acquired thereunder, but, if its status can be defined, by any proceeding known to equity jurisprudence, it is, or is in the nature of an application to enforce a vendor's lien for purchase money. The principles governing the law of the vendor's lien, have by a long and uniform current of decisions in Illinois, been well settled, and have become rules of property in that state, and may be briefly stated as follows (which statement we confidently submit will be fully supported by the authorities which we present):

I.

Vendor's lien is created by operation of law; anything that shows that the vendor did not rely upon it prevents its attaching,

Mosier v. Meek, 80 Ill., 79.

Wilson v. Sawyer, 74 Ill. 473.

Kirkham v. Boston, 67 Ill., 599.

Warner v. Scott, 63 Ill., 368.

Doolittle v. Judkins, 55 Ill., 400.

Carpenter v. Mitchell, 54 Ill., 126.
Wilson v. Lyon, 51 Ill., 166.
Boynton v. Chantlin, 42 Ill., 57.
McLaurie v. Thomas, 39 Ill., 291.
Cowl v. Varnum, 37 Ill., 81.
Phelps v. Conover, 25 Ill., 272.
Keath v. Horner, 32 Ill. 526.
Connover v. Warren, 1 Gilman, 498.

II.

A Vendor's Lien is not assignable.

Dayhuff v. Dayhuff, 81 Ill., 499.
Mosier v. Meek, 80 Ill., 79.
Markoe v. Andras, 67 Ill., 34.
Carpenter v. Mitchell, 54 Ill., 126.
Richards v. Leaming, 27 Ill., 431.

III.

Is never enforced against an innocent purchaser.

Harshbarger v. Foreman, 81 Ill., 364.
Wilson v. Lyon, 51 Ill., 116.
McLaurie v. Thomas, 39 Ill., 291.
Dyer v. Martin, 4 Scammon, 146.

IV.

Equity can not create a lien.
Dewey v. Eckert, 62 Ill., 218.

V.

The law does not favor secret liens.
McCoy v. Morrow, 18 Ill., 518.

IV.

The vendor's lien, to be enforced against a purchaser with notice, must be enforced with diligence.

Trustees *v.* Schools, 11 Ill., 602.

VII.

If the lien creditor under the Mechanic's lien law does not bring his action within the statutory time strictly, he cannot enforce it against a creditor whether his debt existed before or after the mechanic's lien attached.

Shaffer v. Weed, 3 Gilman, 511.

It will be recollected from the date of the various mortgages, that two of the mortgages were made long after the title to this right of way had vested in the Railroad Company, and there is no pretense in the evidence that either the Trustees or *cestuis que trust*, under either of the mortgages, had any notice that the right of way was not paid for.

VIII.

Applying the above well settled principles of law to the petitioner's claim, it is manifest, that he has no standing in court. The title to the land embraced in the right of way is not conveyed to the P. & D. R. R. Company; but it comes into court, simply as the assignee of the contracts, and even if it came into court, as the assignee of a note given directly for the right of way it would have no standing in court. Suppose Short & Co., were the petitioners, not having, in any way, divested themselves of any rights they may

have ever had, it is manifest that they could not enforce a vendor's lien, even against the Railroad Company, as it is plain they parted with the title to the land, without an intention of relying upon it for payment, but relying solely upon the benefits to be derived under the contract, thus negativing all idea of a vendor's lien.

IX.

We submit that, if this were an action at law, for a breach of this contract between the parties thereto, no action could be maintained, under the familiar maxim, "*Exturpi contractu actio non ovitor.*" But even if Short & Co. had taken a note for the purchase money, it could not be enforced against these mortgagees, who are innocent purchasers of the property, without notice.

One other consideration we desire to urge upon the attention of the Court. The principle is well settled that where a contract is void, as being "*contra bonos mores*," the law will afford neither party a remedy. It will not undertake to place them in *statu quo*, but leaves them where it finds them.

We insist these contracts come fully within the above definition, and that neither law or equity will afford a remedy to either party for the breach of such contracts, in a proceeding directly between themselves, much less where an assignee of such a contract comes into a Court of Equity, and seeks a remedy against innocent purchasers for value without notice. We will add, in conclusion, on this branch of the case that, to put it in the mildest language, the claim is novel, and cannot be brought within any rule of equity, known to

us, not even that shadowy "something," of which we have heard so much in the argument of this case, and which counsel are pleased to style a "moral equity," whatever that may be. It is so steeped in fraud, as to make it "offensive to the judicial mind."

X.

Upon the point made under the charter all we desire to say is, that the provision in the charter is for the benefit of the corporation, to enable it to take the fee, rather than an easement, and it provides that on payment of the consideration money the fee passes to the corporation. This we deem the full object and intent of the provision.

R. E. WILLIAMS.

of counsel for Farmers' Loan and Trust Co.

An Illinois statute provides: "That all persons * * * who shall have done and performed, or shall hereafter do and perform, any work or labor for such construction, maintenance, operation or repair * * * shall be entitled to be paid for the same as part of the current expenses of said road; and in order to secure the same, shall have a lien upon all the property, real, personal and mixed, of said railroad corporation as against such railroad, and as against all mortgages or other liens which shall accrue after the commencement

* * * of said work and labor." Under this provision the plaintiff sought to enforce a lien as assignee of certain certificates of indebtedness which he acquired by advancing money to the company's laborers at the request of the company. But the Supreme Court held that he could not so acquire a lien in the following:

1. If a party, at the request of a railroad company, takes up certificates of indebtedness issued by it to its laborers for work and to procure board, and to enable boarding-house keepers to obtain groceries and provisions for hands engaged in the construction of the road, with an agreement to settle with him for the same, such party will be entitled to recover of the company the amount of such advances.

2. The lien given by statute against the property of a railroad company is only for materials used, supplies furnished, and for labor performed in constructing, repairing, operating, or maintaining the road. The loan of money, or the payments of its creditors, is not embraced in the statute giving the lien.

3. A party who, at the request of a railway company, takes up its certificates of indebtedness given to its laborers and others for the boarding of hands, is not entitled to any lien, under the statute, against the company or its property.

4. Although a laborer upon a railroad has a lien by statute for the sum due him, it is not assignable by law, and even if assignable, it would not entitle the holder of the same to assign the lien.

5. Liens are enforceable in equity, unless the law has provided another mode. This is true of vendor's liens, equitable and other mortgages, and all statutory liens, except when the lien is in the nature of a pledge, and possession accompanies the lien. A court of law does not possess the means of enforcing such liens.

Cairo & Vincennes Railroad Company v. *Fockney*, 78 Ill., 116.

UNITED STATES CIRCUIT COURTS,

FOR THE SOUTHERN DISTRICT OF ILLINOIS AND DISTRICT OF INDIANA.

MALCOLM C. TURNER *et al.*,

vs.

THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY COMPANY, *et al.*

} *Original Bill in Chancery.*

AND

THE FARMERS' LOAN AND TRUST COMPANY

vs.

THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY COMPANY, *et al.*

} *Cross Bill.*

ARGUMENT OF ASHBEL GREEN,

Before Judges DRUMMOND and GRESHAM, at Indianapolis,

February 23d, 1878.

ENGLEWOOD, N. J.:
TIMES BOOK AND JOB PRINTING HOUSE.
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} *Cross Bill.*

Argument of Ashbel Green,

Before Judges Drummond and Gresham, at Indianapolis, February 23d, 1878.

May it please the Court:

This suit was originally brought in the State Courts of Indiana and Illinois respectively, not by the Farmers' Loan and Trust Company, the Trustee under the mortgages foreclosed by the decree, but by Turner Brothers,

unsecured creditors of the railroad company, claiming that the corporation was insolvent and asking for the appointment of a Receiver, and for judgment ascertaining the indebtedness of the corporation, marshalling the assets, selling the property and distributing its proceeds according to the equitable rights and the legal priorities of the several parties interested therein.

The original petitions, the Court will observe from an examination of the records, were filed by Mr. Henry Crawford as attorney for the Turners simultaneously in the State Courts of Illinois and Indiana, on the same day. With an alacrity which did this insolvent corporation great credit, it on the same day appeared in both of the Courts—in the Court of Indiana by Messrs. McDonald & Butler, and in the Court of Illinois by Mr. R. G. Ingersoll. These two parties, the Turner Brothers, representing unsecured creditors and claimants under a chattel mortgage, in regard to which your Honors are now fully possessed of the facts, on the one side, and the Railway Company upon the other side, in the absence of the bondholders and of the Mortgagee their Trustee, voluntarily appeared in the County Courts of these two States and had a Receiver appointed.

Now, it cannot be pretended for a moment that what was done in the progress of the cause up to this time, bound anybody except the parties then present in the litigation. It was a mere consent order. I submit to your Honors that the law on that subject is, that in regard to all such orders, like consent decrees, even the Court itself is not bound, inasmuch as it simply acts as a means of registering the agreement of the parties before it. And upon that subject, if your Honors please, before I get through, I will have something more to say, and shall cite authorities to support this view.

In this condition of affairs, the Receiver qualified on the 18th of November, 1874, in Illinois, and in Indiana on the 21st day of November, 1874. I stop to allude to that for

the purpose of disposing of the claim made, for what purpose I know not, by the learned Counsel (Mr. Butler) day before yesterday, that this was an Indiana Receivership. But your Honors will see, when you come to look at the record in the case, that both of the orders provide that the Receiver shall, upon filing his bond and taking the oath, be invested with the property of the corporation; and be authorized to enter into its possession. Therefore, until the bond was filed and the oath taken, the Receivership had not commenced. That was done in Illinois on the 18th of November, 1874, and in Indiana on the 21st of November, 1874. So that if it is supposed that there is any difference between these Receiverships, if one of the suits is to be considered as primary and the other as auxiliary to it, the Illinois suit is to be considered as the primary suit and the Indiana case the auxiliary. The Supreme Court of the United States has at last relieved the bench and the profession of the necessity of these double suits. In the case of Muller vs. Dows, the Chicago and Southwestern Railroad case, the Court has solved the difficulty, and we shall have no further necessity of two suits to foreclose a mortgage upon one railroad lying in two States.

After legal proceedings had been instituted, the bondholders awoke to the situation; their fears were somewhat excited; they learned of heavy judgments being entered in Illinois on behalf of the Turner Brothers to the amount of $1,000,000, and of a suit pending in this State, to recover the same amount. Anticipating a repetition of some performances which had been enacted in other causes, they were led to believe that this Receivership was a mere makeshift; and that unless they quickly intervened in the litigation in the State Courts, the Receiver would be discharged and execution would be issued and a seizure be made in Illinois of the rolling stock of the company, under the idea which had been suggested by the provisions of the amended constitution of that State, that such property was not being covered

by the mortgages. Therefore, very naturally and prudently, their trustee intervened by cross bill, and according to well recognized principles of equity practice, came in and asked that the Receivership originally granted under the Turner bill, should be extended for their benefit as Trustee under the prior mortgage; and as a matter of course, it followed incidentally, that their prior right in law, transferred the Receivership originally created under the Turner bill, into a receivership for their benefit under their cross bill. Upon that point, if your Honors please, I cite Kerr on Receivers (Am. ed.) pages 160, 172; 2 Daniell's Practice 1716, 1718; Howell *v.* Repley 10 Paige 43.

Without stopping now to inquire, as to what may be the effect of a Receiver being obtained by a junior mortgagee, in aid of a bill to foreclose his mortgage as to the rents and profits which may be paid to the Receiver before the intervention of the prior mortgagee, or whether the rule is well established in this country, that such junior mortgagee is entitled to such rents and profits up to the time of the appointment of the Receiver upon a bill filed by a prior mortgagee, not a party to the original suit, or whether if such prior mortgagee is a party to the original suit he is not entitled to the rents and profits, upon the ground that the appointment of a Receiver is not for the benefit of the complainant merely, but for all other parties to the cause who may have rights in the subject matter and that the money in the hands of the Receiver is *in custodia legis* for whoever can make title to it—there can, I submit, be no doubt as to the principle, that so far as the *corpus* of the estate is concerned, the appointment of a Receiver alters no rights and creates none, as to which I refer to Willamson v. Wilson 1. Bland 421. The long and well established rule of the English Chancery is, that the appointment of a Receiver at the instance of the junior mortgagee is always made without prejudice to the rights of the elder

mortgagee. In the language of Lord Eldon in the case of Davis *vs.* The Duke of Marlborough (2 Swanston 137); "The rule I take to be, that the Court will, on motion, appoint a Receiver for an equitable creditor or a person having an equitable estate without prejudice to persons who have prior estates: so much is it without prejudice to persons having prior legal estates, that the Court will not prevent their proceeding to obtain possession, if they think proper; and with regard to persons having prior equitable estates, the Court takes care in appointing a Receiver, not to disturb equities; and for that purpose, directs inquiries, to determine priority among equitable incumbrances: permitting legal creditors to act against the estates at law, and settling the priorities of equitable creditors." So that in addition to the argument that the order for the appointment of a Receiver having been by a consent, to which the Farmers' Loan and Trust Company was not a party, is not being binding upon it, we have the argument, that so far as concerns the body of the estate, or what is the same, the proceeds arising from the sale of the mortgaged property, the provisions of the order appointing the Receiver, cannot in any way affect either the legal rights or equitable priorities of the Farmers' Loan and Trust Company as Trustee for the bonds secured by their mortgage.

But it is contended, if your Honors please, upon the other side, that (inasmuch as there seems to be a clause in the order which was granted, extending the Receivership, that the extended Receivership is to be subject to the condition of the original order) the Farmers' Loan and Trust Company, when it obtained the order containing that condition, made a bargain with the Court and are estopped from now denying the right of these laborers, supplymen and other parties to be paid the amount of their claims during a period of six months prior to the appointment of the Receiver, either out of the net earnings of the Receiver-

ship, or out of the proceeds of the sale under final decree.

If your Honors please, who made the bargain? Did the Court say to Counsel in the cause, "We will not grant you a Receivership, unless you forego some of your rights?" Is that the doctrine that is contended for? I respectfully submit to your Honors, that a doctrine more monstrous than that can hardly be conceived of. It is against such heresies as this that good judges, while anxious to amplify their jurisdiction, yet unwilling to do so at the expense of legal and constitutional principles, have uniformly protested. Courts do not make bargains for the granting of justice; they never refuse judgment to parties entitled to it, except upon their agreeing to terms not required by legal principles. Neither do they grant judgments repugnant to such principles upon the successful parties making stipulations for such judgment. Either the mortgagees were entitled to the Receivership on principle, or they were not. If they were so entitled to it, it is to be granted without condition. If they were not entitled to it, no terms exacted from them will right the wrong in granting the Receivership.

The learned Counsel who presented that argument, insisted that as the granting of the Receivership was a matter of discretion, the Court, if it granted the Receivership, might impose terms and conditions on the mortgagees seeking it.

Now, it is true, if your Honors please, that some cases do say that the appointment of a Receiver is discretionary with the Court to a certain extent, to be governed by a consideration of the circumstances of each case. But this discretion of a Court of Equity is a judicial and not an arbitrary discretion, and is always governed by well established rules. In the case of Cowper vs. Cowper, 2 P. Wills, 773, the Court says: "There are certain principles on which Courts of Equity act, which are very well settled. The cases which occur, are various; but they are de-

cided on fixed principles. Courts of Equity have in this respect, no more discretionary power than Courts of Law." And, upon that subject of discretion, I need not do more than remind your Honors of what is said by Justice Story, in his work upon Equity Jurisprudence, Sec. 13, where he observes that a "very learned Judge in Equity, in one of his ablest judgments, has put this matter in a very strong light. 'The law is clear,' said he, 'and Courts of Equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. And though proceedings in equity are said to be *secundum discretionem boni viri;* yet when it is asked, *Vir bonus est quis?* the answer is, *Qui consulta patrem, qui leges juraque servat*, and, as it is said in Rook's case, (5 Rep. 99 b), that discretion is a science, not to act arbitrarily, according to men's wills, and private affections; so, that discretion, which is executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion, in some cases, follows the law implicitly; in others, assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigor of it. But in no case does it contradict or overturn the ground or principles thereof, as has been sometimes ignorantly imputed to the Court. That is a discretionary power which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the Constitution intrusted." Still further, if your Honors please, you will recollect the indignant protest which Justice Story makes against such a doctrine as this, of arbitrary discretion, which is contended for by the learned Counsel on the other side, where he says: (Sec. 19)"If, indeed, a Court of Equity in England did possess the unbounded jurisdiction, which has been thus generally ascribed to it, of correcting, controlling, moderating and even superseding the law, and of enforcing all the

rights, *as well as the charities arising from natural law and justice*, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the judge, acting, if you please, *arbitrio boni judicis*, and it may be *ex æquo et bono*, according to his own notions and conscience; but still acting with a despotic and sovereign authority. A Court of Chancery might then well deserve the spirited rebuke of Selden: 'For law we have a measure, and know what to trust to. Equity is according to the conscience of him that is Chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure the Chancellor's foot. What an uncertain measure would this be! One Chancellor has a long foot; another a short foot; a third, an indifferent foot. It is the same thing with the Chancellor's conscience.' We might, indeed, under such circumstances, adopt the language of Mr. Justice Blackstone, and say: In short, if a Court of Equity in England did really act, as many ingenious writers have supposed it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case."

I shall not stop, if your Honors please, here or at any point in the progress of my argument, to do more than to recall to your Honors' recollection the rule (if indeed it be necessary for me even to intimate it to your Honors), that Courts cannot create law, that it is the function of their office to only construe, expound and administer the law, and that they have no legislative powers whatever; and if it be true that there exist cases of hardship growing out of the administration of justice according to the principle of the law, the appeal is not to this tribunal, but to the law-making department of the State. If this alleged

right of lien, which is said to be consistent with natural justice and equity, has not been crystallized into a rule of law by statute, or if it is not founded, as I trust to show your Honors, upon any well grounded equitable principles, then the recourse that is left to those who complain of the hardship which the want of law thus inflicts, is to appeal to legislative authority, as has been already done in other States, and in reference to like cases, and seek there for a protection for the future.

It is not denied by Counsel on the other side that the complainants in the cross bill were entitled to a Receivership. Neither the validity nor priority of their mortgage is disputed. The failure to pay the interest upon demand, as well as the insolvency of the mortgagor, is conceded on all hands. All the elements are present which go to make up the condition of affairs, wherein the application of the complainants for a Receiver should have been granted, solely upon consideration of their legal rights and equitable priorities and not as matter of favor. The appointment was one, therefore, that they could demand as of right. What power was there then to impose conditions? And if conditions were imposed, were they not void as against common right, and as having been exacted under a duress the more flagrant and unjust, because upon consent extorted under the forms of law, and by judges in the exercise of judicial functions?

This contention of the learned Counsel will lead to this practical result, that bondholders must either have the Receivership, which they are legally entitled to denied and the mortgaged property left to be frittered away piecemeal under executions, and be plundered or wasted by dishonest officials of the mortgagor corporation, or accept the Receivership, coupled under compulsion with arbitrary conditions, having no limit save the will, the conscience, the charity, or it may be the prejudices of the Chancellor. Once define "discretion" to mean

the will of the Judge, and all barriers are overthrown against the imposition of conditions, which result in practical confiscation.

I respectfully submit to your Honors, that the legitimate results of this doctrine of discretion, contended for by the learned Counsel upon the other side, will be to let loose upon the Court, without the barrier of either legal or equitable principles, demands which, however much they may plead to judges as charitable men, must yield as other claims have had to yield, ever since the institution of Courts, to the strict rules of law and to the principles of equity based upon law, which lie at the foundation of all administration of justice.

If your Honors please, in the situation of affairs, (which I had described to you, before I was led away from the history to discuss incidentally these two questions,) the record exhibits a long and severe conflict in the State Courts, resulting, in the end, in a removal into the Federal tribunals, as it were, at the point of the bayonet. My friend, Mr. Williams, in the face of threatened contempt proceedings, for which he may yet have to suffer, after a well fought battle, succeeded in removing into these Courts the record of the causes in the State Courts of Indiana and Illinois. Then your Honors will remember the struggle with the "excresence" known as the Extension. I remark, in passing, that one cannot help but receive an impression from the conduct of the parties, that there is a somewhat intimate connection between the original plaintiffs in the suit in the State Court, the Extension bondholders and their committee, and the Western Car Company. Precisely what that connection is, it would puzzle anybody to divine. Still, it is quite apparent there is something of that sort from their conduct in this cause.

After much delay and much tribulation, the decree of foreclosure is at last entered, containing many provisions

obnoxious to the rights of the first mortgage bondholders, and as to which this rehearing is now taking place.

Now, if your Honors please, what is the result of this litigation? A decree is granted to the complainants, saddled with most extraordinary financial results of the Receivership, which has been worked at a loss; and with enormous claims sought to be charged as prior liens upon the property directed to be sold under the decree. Recollect, if your Honors please, that the most liberal construction of these orders appointing the Receiver, so far as regards these claimants is, that the Receiver is to pay them out of the monies that should come into his hands, after deducting operating expenses; namely, out of "net income." Recollect that the most favorable construction of these orders that can be contended for on behalf of these claimants is that they were to be paid out of the net earnings which arose from the operation of the railroad in the hands of the Receiver. Now, it is apparent to any observer that the Receiver, or the Court, if you please, has made no net earnings in the operation of the road. There is an outstanding indebtedness of accounts due to the amount of about $200,000. I speak now of the date of the 30th of November, 1877, as shown in the Receiver's report. There are Receiver's certificates to the amount of nearly $200,000 more; then there are taxes to the amount of $200,000; then there is the pending award before His Honor, Judge Gresham, to the Rogers Locomotive Works, of $170.000. Now deducting from the sum total of these liabilities the net available assets of the Receivership, which do not exceed $200,000, what is the result? Why, that these bondholders who, after this long litigation, are now permitted to have the benefit of a foreclosure, must provide the funds for the purpose of meeting the Receiver's indebtedness, in addition to these claims allowed by the Master, amounting to half a million dollars or more. So, upon a sale under a foreclosure, the first mortgage bondholders, who really sup-

posed that they had a first lien, if they buy in the property for the protection of their interests, must pay a sum exceeding a million of dollars before they reach their own.

As to the class of claims founded on these supposed liens, there was a reference, and public notice was given, and parties appeared before the Master, and this is the result of his report:

The total amount allowed by the Master is	$501,624.95
Which is classified by the Master as follows:	
Labor and supplies, ...	377,248.85
Western Car Co. rental 1072 box cars for six months at $15 per month, and 100 coal cars at $15 per month, . .	105,480.00
Paris & Danville R. R. Co., Right of way,	17,262,00
Drawbacks on Freight, ...	1,352.60
Stock killed, ...	281.50
Total allowed,	$501,624.95
In addition to the above amounts the Master has reported without recommendation whether they should be allowed or disallowed,	
Lawyer's Fees.	6,033.88
Salary of President and Vice President,	3,186.77
Total, ...	9,220.65
The Masters have classified among Labor and Supplies the following claims:	
Moneys Loaned by Bankers, . .	$17,455.54
Labor claims assigned at a discount, .	46,743.04
Labor claims assigned without evidence whether at a discount or not, . .	4,022.69

By the permission of your Honors, we are now here, primarily, to consider whether these accounts upon any principle may be allowed; and secondly, whether the in-

timations thrown out by your Honor, Judge Drummond, on the former hearing, are to be considered by the Court as binding judgment in this case. Of course, we labor in the consideration of this question, under some difficulties. Any advocate at the bar, who has a proper respect for himself and for the Court which he addresses, must approach with some diffidence, the discussion of a question where he is seeking to disturb an opinion already rendered; yet, your Honor has always treated with so much consideration and kindness our suggestions made heretofore, and expressed so much willingness to have this matter fully argued (which is, I undertake to say, the first time it has ever been argued in a litigated case before any Federal Court) that I shall proceed as best I can to offer such observations as occur to me, with the utmost respect for the preconceived and expressed opinions of your Honor in regard to it. I trust that your Honors will look at it precisely as did Lord Chief Justice De Grey in the Duchess of Kingston's case, and agree that although it is never permitted for Counsel to show Courts that they are mistaken, still the Courts have always been willing to admit they have been misled, and I am quite sure that if I can convince your Honors that this supposed notion has neither the authority of principle nor the support of a well decided case, so as to bring it within the rule of *res adjudicata*, you will discover a method to relieve us of the difficulty in which, by strict technical rules of practice, we may be placed, and in regard to that as in regard to everything where the rules of substantial justice require it, you will either find a way or make it.

Now, if your Honors please, let us see as we proceed, if we can by common consent, arrive at some fundamental axioms which will smooth the path to a proper solution of this question.

In the first place, is it necessary I should cite authority to establish the point, that in the Federal Courts

a railroad is to be deemed—with its appurtenances, accretions, or whatever you may choose to call its rolling stock—real estate, and to be governed by the principles regulating real property law? I shall not detain your Honors by reading authorities on that. If necessary, they can be furnished. But commencing with the case of Pennock *vs.* Coe, going on through a protracted litigation growing out of the LaCrosse Railway, down to the case of the Galveston Railroad in 11 Wallace, if there is any line of principle running through these decisions, it is that the doctrines of real property are to be applied in reference to railways.

Surely it is not requisite for me to spend time, certainly not in this presence, in citing authority to support the principle that after acquired property, *eo instanter*, when it comes into the possession of a railroad company, passes under the lien of such a mortgage as those to the Farmers' Loan and Trust Company in this case. Your Honor, Judge Drummond, has decided that over and over again, I understand.

Neither, I trust is it necessary for me to prove to your Honors that there is no equity ever created by the fact, that the money of the claimant produced, saved or improved the property, upon which the lien is sought to be placed. That is the doctrine of the Supreme Court of the United States in disposing of the claim of Pulsford, in the 11th Wallace. It is the doctrine of the case of Dillon *vs.* Barnard reported in the 1st Holmes, p. 386, and in 22 Wallace, 430.

I contend, if your Honors please, that there is no difference in the rule of law which has been laid down, in regard to railroad mortgages, from that laid down in reference to mortgages of other estates. The learned Counsel upon the other side was pleased to say in anticipation of what we might argue, that whatever authority would be produced by us would be from cases involving

rights under mortgages upon other than railway property. I shall cite no such authority. I shall rely for the truth of our insistment most confidently upon the decisions of the Supreme Court of the United States; binding, at least, in this Court if nowhere else. And, if that Court, in arriving at its conclusions, saw fit to find an analogy in old legal principles involved in the doctrines regarding mortgages on real or personal property, I, for one, am content to tread most humbly in such footsteps.

I call your Honors' attention to what was said by Mr. Justice Clifford in Dunham vs. The Railway Company, 1 Wallace, 268—"an attempt is made by the respondents to maintain that railroad mortgages made to secure the payment of bonds, issued for the purpose of realizing means with which to construct the road, stand upon a different footing from the ordinary mortgages to which such general rules of law are usually applied. Authorities are cited which seem to favor the supposed distinction, and the argument in support of it was enforced at the bar with great power of illustration; but suffice it to say, that in the view of this Court the argument is not sound, and we think that the weight of judicial determination is greatly the other way."

Moreover, if your Honors please, I contend, and think I shall show you by authority, that if the mortgage be silent, or if its terms be such as are usually incorporated in railway mortgages, that while it may be true that before entry, the income is at disposal of the mortgagor to be dealt with by him as he pleases and is subject, upon proper application being made by a diligent unsecured creditor, by judicial process, to the payment of his debts, still that after entry, the income belongs just as securely and firmly to the mortgagee, as does the very body of the property itself.

Then I trust to be able to show to your Honor, from

like high authority, that the custody of a Receiver appointed upon the application of the mortgagee, is equivalent, in its effect, to the entry of the mortgagee itself; and that the Court, after the granting of the Receivership, upon the application of the mortgagee, stands in the place of the mortgagee and deals with the property precisely as the mortgagee ought in law to deal with it.

I will not trouble your Honors to recapitulate these fundamental principles. I believe them to be supported both by reason and authority, and as I pass along I shall indicate the source of such authority. I beg of you, however, to give me, for the purpose of my argument, the benefit of a temporary assent to these propositions.

Now, if your Honors please, I submit to you that there is but one way in which these claims, or claims of the character which have been presented to you, excluding those asserted in the Paris & Danville Railroad case, can be upheld. None of them can be sustained unless they constitute a lien upon the property in some shape and form, of some kind or character. All through this and kindred litigation, intelligent and ingenious Counsel have been impressed with the necessity of a lien in order to support these claims. Why, if your Honors please, it can be nothing less than a lien which gives any foundation for such claims as against the recognized lien of the complainants. And here, by way of illustration, let me ask your Honors what would have been the condition of any one of these claimants, whether the supply man or the laborer, if his debt had matured into a judgment? Does a judgment creditor get any right to the mortgaged property of the judgment debtor, as against a *bona fide* mortgagee, superior to that which is possessed by the judgment debtor himself? If there is necessity for citing authority on that subject, I refer to Freeman on Judgments, section 356, Brown vs. Pierce, 7 Wallace 205, and Baker vs. Martin, 12 Wallace 150.

Could such judgment creditor after judgment, have levied upon this property and sold it, free from the mortgage? If it be true that a creditor with his claim ripened into judgment, would not have a superior lien or a superior equity to this mortgage, with what reason do Counsel insist that a simple contract creditor can have any such claims? If, then, a judgment creditor or a second mortgagee, claiming as he must under the mortgagor, and being thus 'in privity with the Railroad Company and bound by the estoppel created by the mortgage to the complainants,' (11 Wall, 482,) has no lien, *a fortiori*, a simple contract creditor claiming in like manner under the mortgagor must be equally bound by the estoppel, unless some fraud exists, which is not charged in this case.

I say there must be a lien. Counsel have struggled hard to find one. It had been supposed in olden times, that liens arose either from contract or were created by statute, or by some doctrine of the common law, and that that list completed the catalogue. Your Honor will find, if you take the trouble to look at it, in the case of Morgan vs. The City of Cincinnati, 3 Wallace, 286, that Counsel in argument, said that that most able lawyer, Mr. Attorney General Stanbery, had attempted to increase the list by creating a new kind of lien; namely, "the lien by argument." I apply to my learned friends upon the other side, the language used by Mr. Evarts in that case to Mr. Stanbery, and say to them, that although the bar generally would admit, that if these new liens they have thus attempted to invent, can exist at all, my learned friends are as able to create a good one as any men living, still we must deny even to them the privilege of creating for the parties liens which they had no design of creating for themselves.

Our learned opponents have indefinitely increased the catalogue, and the lien which they seek now to establish, is at once a lien by analogy; a lien by compulsion; a lien from sympathy; and a lien from fright.

Your Honors inquired, day before yesterday, whether I undertook to run any distinction between the character of these different classes of claims. I frankly confess that I cannot as the law now stands. If there be any law on the subject, or to speak more accurately, as the practice seems to have been adopted *sub silentio*, I admit that if you propose to open the door, that the same principle that opens it at all, should open it wide. The origin of this doctrine, if it ought to be called a doctrine, is to be found as I indicated to your Honors the other day, in the notion which possessed some Courts, that the class of parties who were sought to be benefited by it, were laboring men, trusting rather to their employers than looking after their own interests, and that those only should be protected who were least able to protect themselves, who earned their living by manual labor for a small compensation, and were deemed to be to a certain extent, in the power of their employers. The Courts limited their benevolence at the outset to those to whom the withholding of their dues, though small in individual cases, would produce a large amount of distress. Undoubtedly when the notion first sprung up these were the reasons which led Courts to a favorable consideration of this class of claims. Well, that being so, the door being open just a little, the legal rights of the mortgagee being pushed aside gently, this judicial charity came into existence. Criticism being directed against it, reasons for the rule were demanded and sought for. They were supposed to arise, sometimes from analogy; sometimes in other ways. But if your Honors please, undoubtedly the very moment that you attempt to say that a lien shall be set aside in favor of the laborer who has run the train or repaired the road, I see not why you should not go further and give this poor unfortunate, the Western Car Company a right to be paid for the use of its cars, as well as the brakeman or the machinist the right to be paid for the

use of his muscle. My brother, Harrington, in his brief says, that these men patiently awaited the coming of the paymaster. It can hardly be true that the Western Car Company patiently awaited the coming of the paymaster. But although the method of payment was different, there is no reason in the world why, if your Honors are going to act as almoners of this bounty, from the funds of these unwilling bondholders, you should not give all these people a share of the plunder. Although such be the origin of the practice I see no reason why, if this relief be granted at all, it should not be granted to them all. The mantle of such charity is broad enough to cover all. Still this condition of affairs is enough to excite alarm, even in the most charitable judicial breast. If this doctrine is to produce such extraordinary results, amounting in fact to practical confiscation, then I trust, I can appeal to your Honors, as other Courts have been appealed to before, against a rule which leads to such inconvenience as well as works such injustice.

I appeal to your Honors, to be careful how you admit a new and most dangerous principle to be incorporated into the body of the law; which by its insidiousness must ultimately destroy every right of property which exists, and worse than that, must destroy the confidence reposed by the people in the righteousness of judicial determination.

Now, if your Honors please, returning from this digression, I repeat, that in order to support these claims, there must be a lien, and the first argument is that it is a lien from analogy.

It is now contended for these petitioners and claimants that these several sums, amounting in the aggregate to over a half-million of dollars, are to be paid out of the proceeds of sale of the mortgaged property upon a foreclosure, in preference and prior to the bonds secured by the mortgages which were duly recorded, and which record by express statute in both Illinois and In-

diana, is full notice to all the world of their existence, and the effect of which record is to give the mortgagees a prior lien over all conveyances, judgments, liens and other incumbrances subsequently executed. As to the effect of the record of the mortgages, I refer to Illinois General Statutes, (Gross), chapter 25, section 19; Indiana act May 6, 1852—1 Blackf. 151.

The only statute in Illinois which it is claimed has any bearing upon this supposed lien was approved April 3, 1872, and went into force July 1, 1872, and will be found in Revised Statutes of Illinois, 1874, pp. 671, 851. It reads thus:

"All persons who may have furnished, or shall hereafter furnish to any railroad corporation now existing, or hereafter to be organized under the laws of this State, any fuel, ties, material, supplies, or any other article or thing necessary for the construction, maintenance, operation or repair of such roads by contract with said corporation; or who shall have done or performed, or shall hereafter do or perform any work or labor for such construction, maintenance, operation or repair by like contract, shall be entitled to be paid for the same as part of the current expenses of said road, and, in order to secure the same, shall have a lien upon all the property, real, personal and mixed, of said railroad corporation, as against such railroad and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles, or the commencement of said work or labor, provided suit shall be commenced within six months after such contractor or laborer shall have completed his contract with said railroad corporation, or after such labor shall have been performed or material furnished."

There is no law in Indiana, as I am advised, which is applicable to this subject, or creates any such lien upon such property as is created by the statute of the State of Illinois, which I have quoted.

Now, if your Honors please, if there is any analogy to be followed, I respectfully submit it should be an analogy within the provisions of the statute; and that if a lien is to be created from analogy, it should be a lien only when the claimant either complies with the terms of such statute, or with something equivalent to it. Now, this statute contemplates action upon the part of the supposed lienor. It does not tolerate secrecy, which of course is abhorrent to all principles of equity. It does not tolerate want of diligence; but when the leinor seeks to be protected, as a matter of course, he must do certain things and do them quickly; and among the other things he is required to do, is that he must turn this inchoate right of lien into some fixed lien by putting the claim in suit within six months. None of these claims were put in suit, as I understand it, or at least no suit was brought upon them before November, 1875. A suit was necessary, and a suit would have been properly brought if there was a lien. There is no right without a remedy, and if these people had an equitable claim or equitable lien, it would have been a foundation for an action. If it be said that the appointment of the Receiver prevented the suit, we reply that an application to the Court, either by intervening petition or for leave to sue the Receiver within the six, months, was open to the claimants; and as there was no injunction preventing suit against the corporation, suit might have been brought against the corporation itself. So if you are to reason from analogy from this Illinois statute, you must take the whole statute as it is, and these creditors should have done something to have turned this inchoate right of lien into an absolute legal or equitable right.

Then, in the second place, I contend, from the language of that statute, that a lien under it, or a lien supposed to exist from analogy to it, upon its requirements being fulfilled, are only paramount to the lien of a mortgage accruing

after the commencement of the delivery of the supplies, or the commencement of the work or labor. The lien of the mortgages to the complainant accrued in 1869. The work and labor was performed and supplies were furnished in 1874.

There is a little indistinctness in the language of this statute. But I think, when you come to analyze it, there is no doubt about what it means:—"shall have a lien upon "all the property, real, personal and mixed, of said railroad "corporation, as against such railroad and as against all "mortgages or liens which shall accrue after the commence "ment of the delivery of said articles, or the com- "mencement of said work or labor, provided suit shall be "commenced." That, undoubtedly, means against all mortgage liens which shall accrue and other liens which shall accrue after the commencement, etc., etc. So that the mortgage liens to which it is to be paramount, were the mortgage liens which accrued after the commencement of the delivery of the articles or the performance of the work. By the recording of our mortgage, our lien accrued upon the property in 1869; and, therefore, work, labor and supplies furnished in 1874, are not either within the terms of the statutory lien or any lien which may be supposed to be created by analogy to the statute.

In the next place, there is this principle: that statutes creating liens of this nature are to be strictly construed, especially as regards *bona fide* purchasers, incumbrances, and other creditors; the reason of that principle is, that these statutes are in derogation of common right, as to which I cite Morgan v. Cincinnati, 3 Wall 275, Davis v. Alvord, 4 Otto 545; Phillips, on Mechanics' Liens, sections 18, 20. So if your Honors are to build up a lien by analogy from this statute, you must not disregard the provisions of the statute itself, or attempt to extend them by construction or by implication. I need not cite authorities to your Honor that

the construction of State statutes by the Court of last resort of that State, are to be regarded in the Federal Court as if they were *ipsissima verba* of the statute itself. That being so, I only call your Honor's attention to the cases where the Supreme Court of the State of Illinois in the construction of kindred statutes to this, have over and over and over again, in the most decided language, held that the party seeking to enforce the privilege granted must bring himself within the terms of the statute, which is opposed to common right, and should be strictly construed. Inasmuch as these statutes confer special privileges, they are not to be extended by liberal construction. I cite Cook v. Heald, 21 Ill. 425; Brady v. Anderson, 24 Ill. 110. In Stephens v. Holmes, 64 Ill., 336, Rothgerder v. Dupuy, Ibid., 453, and Huntington v. Bartno, Ibid, 502, the Supreme Court held that mechanics' liens are in derogation of common right, confer special privileges and are not to be extended by liberal construction. The opinions in these three cases contain strong expressions of the necessity of strict construction of statutes of this kind. And, if your Honors please, you will find this doctrine applied by the Supreme Court of the State of Illinois to this identical statute creating this railway lien. In Arbuckle v. Illinois Midland Railway Co., 81 Ill. 429, a strict construction is put by the Supreme Court upon the act of February 22, 1861, (Public Laws 142), and the act of April 3, 1872 (Sess. Laws, p. 279,) creating liens against railway companies.

In the next place, I submit to your Honors this proposition: that where a mortgage is recorded before the beginning of the work, the mortgagee has the prior lien. Where a mortgagee has placed his mortgage on record, his rights are then protected by law. In such case the lien of the mechanic is subordinate to that of the mortgagee, although the mortgagee knew

of such work and labor at the time the mechanic rendered the same, and did not object.

The same principle applies in favor of mortgages recorded before the statutory notice. Thus, where mechanics were required to record their liens, a mortgage recorded first has precedence. The rule of *caveat emptor* applies against a mechanic as well as in the case of a vendee. If a contractor proposes erecting buildings, furnishing materials, or putting labor on a lot of ground, it behooves him to examine and assure himself of the fact that the person with whom he contemplates making the contract, or for whose benefit he is about to employ his means in labor, has such an interest or title unencumbered, as will enable him to avail himself of a valid or efficient lien. Under the system of registration in this country, a little diligence will always impart to a person the requisite information, and if he fails to inform himself, the law will not relieve him against the consequences of his own negligence, for which I cite, Philips on Mechanics Liens, sec. 232.

Before I conclude, I shall show your Honors, in parallel columns, who the officers of the Western Car Company, and who the officers of this Railroad Corporation were. Did the officers of the Car Company not have actual knowledge of the existence of our mortgage and of the lien it created? If they did not have such actual knowledge, your Honors would of course hold that they had at least constructive notice given by the registering and recording of the mortgages.

As the statute of each State fixes the time for the inception of the lien, it follows that whenever a notice of lien is made necessary for its creation, all transactions with *bona fide* purchasers, prior to strict compliance with the statutory requisites of notice, will be effectual, even to the entire exclusion of the mechanic. Philips on Mech. Liens, sec. 233. Homans v. Coombe. 3 Cranch, C. C. 365.

I insist, therefore, that in the cases at bar, no claim

under the statute can be supported against any one, or by analogy, *from the statute* against any one, for the reasons that suit was not brought during the time limited by the statute, and that the inchoate right of lien became utterly extinct without any power of revival by any act, either of the parties, or of a Court, and for the further reason that no lien based on labor performed, or supplies furnished in 1874, can be upheld against the mortgage whose lien accrued by registration in 1869.

Now, if your Honors please, there are some authorities on this subject which have been cited as adverse to these views. But, when the cases are examined, they will be found not opposed to our insistment. These authorities are, Davis vs. Bisland, 18 Wallace, 661; Fox vs. Seal, 22 Wallace, 437, and the case of Taylor vs. Burlington, Cedar Rapids and Min. R'y. C., decided by Judge Dillon, reported in 9 Chicago Legal News, 329. But if your Honors please, these were all decided upon a construction of the phraseology of the statutes providing for a lien; which either created a lien as of the time when the work was begun, or one which had precedence over every right that could be acquired under any mortgage made after the debt to the workmen had been incurred. In each case the mortgage had been executed after the date fixed by the statute for the inception of the lien.

I undertake to say, there is not a case which, if it appears at first sight to favor these claims, will not be found to arise upon the construction of the phraseology of the statute, which had in express terms made the right prior to that of the mortgagee.

But, if your Honors please, if this statute of 1872 is to be construed so as to defeat the prior right of the mortgage vested in 1869, then the act itself would be unconstitutional and void. The result of such a construction, or the result of the creation of a lien by analogy to that statute, would be to withdraw the property

from the prior lien of the mortgage; to destroy a vested right of property in the mortgagee; to take the property of one person and give it to another without compensation, and to impair the obligation of the contract. A legislative or even a constitutional enactment, which has legislatively this effect, cannot be upheld. No constitution, no legislation, no Court can violate that principle. If the statute of Illinois, passed in 1872, should be held by implication or by construction, to have the effect of giving this right in preference to our prior mortgage completed in 1869, it would be absolutely unconstitutional and void. And I submit that no Court under pretense of analogy from such a statute can alter vested rights, or do acts forbidden alike to Legislatures and Constitutional Conventions.

But, if your Honors please, other objections to this lien by analogy present themselves.

First, a lien of the character sought to be established in this suit, is the creature of State law alone, and no lien can be implied where the very words of the statute does not give it. This I understand to be established by the Supreme Court of the United States in the case of Canal Co. vs. Gordon, 6 Wall, 561; and by the case of Cincinnati City v. Morgan, 3 Wallace, 375, the syllabus of which reads: "To acquire, as against all mortgagees and incumbrances, a lien by statute upon the *corpus* of a railroad by virtue of credit advanced, it is necessary that the statute express in terms not doubtful the intention to give a lien."

Then, if your Honors please, I submit this consideration: That if a power to create liens from analogy, or by implication exists in any Court, it does not and cannot exist in the Federal Courts. These Courts have the jurisdiction and powers granted to them by the laws of the United States consonant with the provisions of the Federal constitution, and none others. What these powers are, so far as equitable actions are concerned, is well stated in Fountain

v. Ravenal 17. Howard 384, by Judge Story, "The Courts of the United States cannot exercise any equity powers, except those conferred by acts of Congress and those judicial powers which the high Court of Chancery in England, acting under its judicial capacity as a Court of Equity, possessed and exercised *at the time of the formation of the Constitution of the United States.*"

And Taney, C. J., in the same case says: "The 2d section of the 3d article of the Constitution declares that the judicial power of the United States shall extend to all cases in law and equity specified in the section. These words obviously confer judicial power and nothing more; and can not, upon any fair construction, be held to embrace the prerogative powers which the King, as *parens patriae*, in England, exercised through the Courts. And the Chancery jurisdiction of the Courts of the United States, as granted by the Constitution, extends only to cases over which the Court of Chancery had jurisdiction, in its judicial character as a Court of Equity. The wide discretionary power which the Chancellor of England exercises over infants, lunatics or idiots, or charities, has not been conferred." And Judge Baldwin, in Baker v. Biddle, Baldwin 394, says: "Notwithstanding Circuit Courts, by the judiciary act, were clothed with jurisdiction in all cases in equity, yet such jurisdiction must be executed within the limits prescribed by the organic law conferring the powers and confined to the cases and subjects defined." I refer also to Loring v. Marsh, 2 Clifford, 492.

Now, then, if your Honors please, unless you can find some authority for the creation of this lien by Courts, either from a statute or from some power of a Court of Chancery as it existed at the time of the formation of the constitution, I respectfully submit to your Honors that this Court has no such power. Of course, every lawyer knows that no such power was vested in an English Court of Equity at any time. Indeed, liens of this nature are still unknown

to English jurisprudence. Phillips on Mechanics' Lien, sec. 1, at the end says: "None (i. e. legislative enactments) were ever adopted and none to this day are to be found on the statute books of Great Britain, securing in any manner to the mechanic or material-man a lien on the buildings their industry or capital have contributed to erect," and the Supreme Court of the United States in 6 Wall, 561, say: "*Liens of this kind were unknown in the common law or Equity jurisprudence both of England and of this country. When they exist in this country they are the creatures of local legislation.* They are governed in everything by the statutes under which they arise." So that one source from which the Federal Courts of the United States derived some of their powers, viz: The equity power of a Court of Chancery of England, existing at the time of the formation of the constitution, does not embrace claims of this character; for as the Supreme Court of the United States have said, liens of this kind were unknown in the common law or the Equity jurisprudence of England or of this country.

Well, then, if your Honors please, if that be so, there is but one other place where authority for the exercise of this alleged power by a federal tribunal or indeed by any other Court, can be found. Because I am not here to deny that Federal Courts, sitting as a Court of Equity within the limitations prescribed by the constitution and the laws under it, when they once have jurisdiction of the subject matter are not to deal with it according to the broad rules of equity jurisprudence.

Therefore, I shall have to detain your Honors while I consider the question whether there is any general principle of equity jurisprudence by which this new species of lien, *namely*, "lien by analogy," can be justified?

It is of course conceded that there are liens recognized in equity, whose existence is not known or obligation enforced by Courts of law. But when you come to analyze

what these liens are, and whence they spring, I submit to your Honors, that they are not of such a character as are analogous to the liens claimed in this case; that none of the class of liens known as equitable liens are broad enough to embrace liens of the character here set up. These liens arise very generally from constructive trusts, such as vendor's liens in the land for the amount of the purchase money, liens created by deposit of title deeds on advance of money, liens resulting to one joint owner of real estate from repairs or improvements made upon such property for the joint benefit. Now, your Honors will perceive, that liens of the character I have mentioned, all arise from contract, either expressed or implied; and that therefore, they are included in the description of liens which I mentioned before, viz: Contract lien or statutory lien; and that they fall within the rules of the common law.

So there is a lien, undoubtedly, as stated in the case of Bright vs. Boyd, 1 Story, R, 478. where the true owner of an estate after the recovery thereof at law from a *bona fide* possessor for a valuable consideration without notice, seeks an account in Equity as plaintiff against such possessor for the rents and profits. It is the constant habit of Courts of Equity to allow such possessor as defendant, to deduct therefrom the full amount of all the meliorations and improvements which he has beneficially made upon the estate and thus to *recoup* them from the rents and profits. But your Honors will observe in regard to that, that in the first place it is a lien in favor of a *bona fide* possessor for a valuable consideration, without notice; in the second place, that it is a lien allowed to the defendant who is sued for rent and profits; in the third place, that the extent of the remedy is to allow him, as defendant, to *recoup* from the rents and the profits, the amount *bona fide* expended in melioration; but as the Court says in Greene vs. Biddle, 8 Wheat, 1: If the true owner stands by and suffers improvements to be made on an estate without notice of his

title, he will not be permitted to enrich himself by the loss of another, but the improvements will constitute a lien on the estate. And Judge Story observes in regard to these classes of liens, that the Courts have never enforced, in a direct suit by the *bona fide possessor*, his claim to meliorations of the property from which he has been evicted by the true owner.

So, if your Honors please, you perceive it was always without notice on the part of the *bona fide* possessor. The mortgages in this case were duly recorded, and thus the claimants asserting this novel lien, are surely not persons acting *bona fide* without notice. They knew of the lien of the mortgages, or what is tantamount, they should have known it; they had constructive notice of it, for the record of the mortgage gave a good and effectual notice to all purchasers, mortgagees and creditors.

Again, it has been said that these liens may be sustained upon the doctrine of estoppel, by reason of the bondholders allowing the labor to be performed and the supplies furnished, without taking active proceedings to obtain possession of the property, or to have a receiver appointed and put in charge of it. There is an indication of that idea thrown out in the remarks of your Honor, Judge Drummond. Undoubtedly all equitable liens repose, to some extent, on the doctrine of estoppel; still I submit to your Honors that it is true, as is said by the Supreme Court of the United States, in the case of Brant vs. Virginia Coal Co., 3 Otto, 326, that it is essential for the application of the principle of equitable estoppel with respect to the title of *real property*, that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge; when the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no

estoppel. And if your Honors will pardon me one moment, I want to read to you in addition, the syllabus of an opinion of an eminent Judge of the Court of Appeals of the State of New York, recently deceased — Judge Grover — delivered while he was a Judge of the Supreme Court, in the case of Rice vs. Dewey, 54 Barb, 457: A claim by purchasers from a mortgagor, that the mortgagee was estopped to set up his mortgage lien against them by reason of his failure to assert the lien during the making of certain improvements on the land by the purchasers was overruled. The mortgagor had a right to presume that the plaintiff had examined the records, and no case could be found holding that a mortgagee whose mortgage was duly recorded, lost any right by neglecting to give personal notice to a purchaser from the mortgagors. The case was not analogous to the class of cases where one having the title to land himself, knows that another *ignorant* thereof, but believing himself to be the owner, is proceeding to erect improvements thereon, and the real owner conceals his title from him, or remains silent in relation thereto.

It your Honors please, I submit to you that the case at bar does not come even within the spirit of that rule. Because, in the first place, these claimants had notice, either actual or constructive; and in the second place, from their relations, especially the Western Car Company, to this raiiroad corporation, they not only knew of the existence and lien of our mortgage, but they also knew of the financial condition of the corporation itself. Because, your Honors will find that the Car Company, as was said by the learned gentleman upon the other side, must have known of the financial condition of this corporation. The car rental had accumulated in arrears, in addition to this enormous claim, now before the Court, to the amount of over $200,000. This accumulation being prior to six months, cannot be pressed here under this supposed lien. But, never.

theless, the fact of the arrears of car rental to the amount of $200,000 prior to six months before the appointment of the Receiver is important, as showing the knowledge of the Car Company of the financial condition of the Railroad Company. Your Honor will also see, that the pay roll had been in arrears for nearly six months. So that both supply men and laborers must have known of the financial condition of the corporation by direct dealing with the Company itself, and therefore, in the language of my learned friend, Mr. Harrington, possessed a superior knowledge to this scattered body of bondholders, (1100 in number) who did not know, and could not know of the true financial condition of the Company. For I undertake to say that the testimony in this case taken in New York, shows conclusively that whatever statements were published, that whatever information was given to the bondholders upon the subject by the managers of this road, turned out, to use the mildest term for it, to be a miscalculation in figures; but always of the most flattering character.

To sum it up then, if your Honors please, I say it is plain that no equitable lien has ever been held to exist, unless it was founded on contract expressed or implied; or was created by, or resulted from some trust expressed or implied, or had grown out of the doctrine of estoppel (which I trust I have shown is not applicable to this case,) or, unless it resulted from breach of trust or fraud on the part of the person whose property is charged with a lien. To no one of these classes do the claims under consideration belong.

If your Honors please, I believe I have shown you, negatively, that there is no equitable principle which will create this lien. I go one step further, and I confidently submit to your Honors that the creation of this lien by this Court, if any Court could ever create a lien, is repugnant to the

fundamental principles of equity itself. And I shall only run hurriedly over some of those principles.

In the first place, priority in time, in the absence of fraud, always creates superiority of right. Says Judge Story, Eq. Juris. § 553: "In the course of administration of assets, Courts of Equity follow the same rulings in regard to legal assets, which are adopted by Courts of Law and give the same priority to the different classes of creditors which is enjoyed at law; thus maintaining a practical exposition of the maxim, *Aequitas sequiter legem.* In the like manner Courts of Equity recognize and enforce all antecedent liens, claims, charges *in rem*, existing upon the property according to their priorities; whether these charges are of a legal or of an equitable nature, and whether the assets are legal or equitable."

In the next place, I submit it is a fundamental maxim of equity, that the equity follows the law in regard to the legal title to the realty, except where fraud intervenes; and that the law in this case is as clear as the sun shining at noon day, namely: That the right of these mortgagees, (by the recording of their mortgage, and by the application of the admitted doctrine that upon the acquisition of property it becomes covered by the lien of the mortgage,) is a superior and paramount title against all creditors, whether privies to the mortgage or not.

Again, I assert that another principle of equity to which this supposed claim would be repugnant, is, that equity abhors secret liens. These are of the nature and character of secret liens, for the bondholders could not know or be supposed to be informed of them.

Then another principle to which I have previously alluded, and which is supported by high authority, is that no equity arises from the fact that the monies of the claimant contributed to the improvement of the property. Your Honors will doubtless recollect the case of Galveston vs. Cowdrey, 11 Wall, 465, where Pulsford claimed, under a

second deed of trust which provided he should have a special lien on a lot of railroad iron which was to be used for completing a portion of the track. An inspection of diagram of the railroad in that report, shows that this lot of iron was to finish the road and make it valuable and useful. Pulsford had an express agreement that the money which he applied for the purpose of furnishing the railroad iron in order to complete this link, was to be a prior lien, and that he should have a special lien upon the iron. Now it was contended in that case, and this contention is alluded to in the opinion, that the company having become bankrupt and unable to finish the road, the work previously done had become worthless, and the pledge given to the prior mortgagee was without value, unless it could be made valuable by Pulsford's money, and that because Pulsford's iron applied to the road saved it and rendered it capable of being used, which it would not have been otherwise. Pulsford was entitled to priority in that case, in analogy to the principle adopted by the civil and maritime laws of awarding priority to the last creditor who furnished necessary repairs and supplies to a vessel. The Supreme Court of the United States, after a full consideration of that question, dismissed Pulsford's claim. His case was argued by Judge Curtis, and precisely the same line of argument was adopted by him in that case, which he presented in the case of Ellis v. Boston, Hartford & Erie Railroad company reported in 107 Massachusetts Reports, and as has been indicated by the Counsel for some of the claimants here. But, unfortunately for my friends on the other side, even the learning and ability of Judge Curtis, failed to elicit any response from the Supreme Court of the State of Massachusetts. In the case in 11 Wallace however, it met with this observation: The Counsel for Pulsford has furnished us with a very ingenious and learned argument upon these points; but we cannot yield to their force.

And the Court then goes on to state that from the established rules as to estoppels, created in favor of mortgagees, the after-acquired property was covered by the mortgages, according to their priorities in record; that Pulsford had no superior lien upon the property, and that where the rails were put down on the Company's road, they became part of the road. The road itself was included in the mortgage and the plaintiff, Pulsford, by allowing his property to go into or become part of the road, consented to its being covered by the mortgage in question, and he acquired no lien which can displace them; and the Court have no hesitation in saying, in conclusion, that Pulsford's claim to priority could not be sustained. If your Honors please, I also call your attention to the case of Dunham vs. Railroad Company, 1 Wallace 254, where Justice Clifford overrules the contention that a contractor expending money and labor in building a railroad, under an express agreement with the company that he shall have possession of the road until he is fully paid, thereby acquires a priority over an elder valid mortgagee.

In the case of Wright vs. Ellison, 1 Wall, 16, in the head notes of the case it is said, to constitute an equitable lien on a fund, there must be some distinct appropriation of the fund by the debtor. It is not enough that the fund may have been created through the efforts or outlays of the party claiming the lien. It was a case where the plaintiff had by efforts of his own, set in motion proceedings which resulted in the payment of money by a foreign government, for an illegal capture of a vessel, and which payment would not have been made, except for the plaintiff's timely effort and outlay. I also refer to Dillon vs. Barnard, 1 Holmes, 386, where Judge Shepley holds that the fact that the complainant's labors had added to the security of the bondholders, would not subordinate their lien to his if he had one; and to the same case on appeal, in 21 Wall, 430.

So, then, if your Honors please, I will pass from this branch of the subject, trusting that I have succeeded in showing you that there is no authority in this Court derived from any principle of equity, to support these alleged liens.

Now, the learned gentleman upon the other side, sought, if I apprehended him rightly, to build up this lien upon the maxim that he who seeks equity must do equity. The short answer to that is, that this rule applies only in cases where the party against whom it is invoked, is seeking relief in the character of a plaintiff in Court. I cannot state the answer to this proposition which was argued in the case of Douglas v. Cline, in the Supreme Court of Kentucky, with half the force with which it is stated by a learned Judge in that case. Therefore, I will trouble you to listen for a few moments while I read an extract from the opinion of Judge Cofer in 3 Central Law Journal, 670: "But it is said the appellants seek equity, and according to the approved maxim, that 'he who seeks equity must do equity;' it was not inequitable to give the appellees the fruits secured by the vigilance of the appellants by the use of their own remedy at their own expense, and that, too, although the appellants, according to the authorities I have quoted, have a specific lien on the earnings in the Receiver's hands, and, as held by the majority of this Court, an equitable lien which must prevail over all others who do not make out a superior claim. I am not aware that this most excellent maxim has ever before been applied to a case like this. It is not pretended that the appellants owed any equity to the mortgagor. The Company was in no condition to invoke the maxim or to ask lenience at the hands of the Chancellor. It had violated every important stipulation in the mortgages; had misapplied the earnings; had failed to pay current interest; had allowed state and municipal taxes assessed against it to be in arrears; the road to be out of

repair; and by failing to pay its employes had excited them to mutiny, threatening the destruction of the road. They owed the appellees no equity. They neither employed them nor promised to pay them, *and some of the appellees who have been ordered to be paid are the President and the other officers of the unfaithful corporation, who may be presumed to be responsible for the mismanagement, not to say bad faith, which led to the wholesale violation of the covenants in the mortgages to which I have referred.* As therefore the appellants owed no equity to the corporation, or to the appellees, the effect of the application in this case of the maxim: 'he who seeks equity must do equity' is, that if A asks the intervention of the Chancellor in his behalf against B, the Chancellor may, as the condition upon which he will grant the relief asked, require A to render to C an equity due from him to B. In other words, and to apply the principle announced to the case in hand, the Company owes to the appellants and the appellees each a debt. It has given the appellants mortgages upon its property to secure the debts due to them, but the appellees have no lien, have no such remedy. The appellants brought their suit, manifested their right, and sought and obtained their remedy; and then it is said that they have no right to complain of the appropriation of those earnings which they intercepted, and which the appellees could never have reached, to pay the appellee's debts. I always supposed that the maxim in question meant that a party seeking the aid of equity must do equity to him against whom he asks relief in reference to the subject matter involved in the litigation, and that it does not mean that he must do equity to all the world besides, and especially that it does not mean that a plaintiff seeking equity must answer for an equity not due from him, but due from his adversary to a third person. If A has an unfair advantage of B, and comes into equity for relief against B respecting the matter to which such advantage

appertains, the Chancellor will apply the maxim and compel A to relinquish his unjust advantage, or if he refuses, will turn him out as unworthy of the aid of a Court of conscience. But if, instead of having that advantage of B, against whom he seeks relief, he has it of C against whom he seeks no relief, it will hardly do to say that A can be denied relief unless he will do equity to C. Yet that case would be far stronger than this. The appellants have no unfair advantage of any one, unless, indeed, the taking of a mortgage security is to be held an unfair advantage of subsequent creditors with notice. The appellants owe appellees nothing and seek no relief against them, and the equity the appellees have is no greater than that which all unsecured creditors have to be paid out of the rents and profits of mortgaged property in the hands of a Receiver pending proceedings to enforce the lien of the mortgage." The maxim of equity, that he who seeks equity must do equity has no application to this case. Your Honors, sitting in a Court of Equity, can not refuse to grant the prayer for judgment of a suitor who comes before you asking for relief in a proper case, because a defendant has been guilty of some lack of equity against somebody else, against whom the plaintiff asked no relief, and who is not even a party to the action.

Again, if your Honors please, I submit that no equitable lien arises from the circumstance that the claim has the appearance of being in conformity with principles of natural justice and equity. Justice Story in the case of Howe vs. Shepherd, 2 Sumn, 409, held "that the mere fact, that a case is in conformity with the principles of natural equity and justice is not sufficient to bring it within the jurisdiction of a court of equity. There are many principles of natural equity and justice which are not attempted to be enforced therein."

And the same learned Judge, whose opinion I have already quoted, Judge Coffer in Douglas vs. Cline, says: "It would

be a great hardship upon the appellees to lose the wages due them for their sweat and toil, but *hardships never create equities.* The Chancellor is not a dispenser of grace. He is bound to recognize the legal, the equitable and the contract rights of suitors. He must be governed by principle and dare not yield to the promptings of sympathy and warp the rules established by a long line of precedents to do what seems to him equitable, unless he can base his decision upon principles which will establish the case as an exception to general rules. The mere discretion of a Court, however learned, wise and virtuous, unless that discretion be guided by principles that may be tested, understood and followed, is a power too dangerous to the contract rights of citizens to be allowed to occupy a place in the temple of justice. That law is best which leaves as little as possible to the mere discretion of the Judge, is one of Lord Bacon's wisest aphorisms. Courts dare not undertake to do, in defiance of the rules of law, what the individuals composing them may regard as abstract justice. When we speak of the administration of justice, we do not mean justice in the abstract, justice according to the refinement of the mere casuist, but justice according to law."

Moreover, following that same line of argument, and accepting as true for the moment, the insistment that liens may arise from moral as well as legal principles, I say that *bona fide* incumbrancers and purchasers are morally as well as legally entitled to equal protection with the mechanic; that there is nothing in the relation of the mechanic, and certainly nothing in the relation of the Western Car Company, or of the supply-man, or of the bank loaning money, which is superior to the rights and the equities of the bondholder, who upon the faith of the lien created by the mortgage, and which by well established principles of law he had the right to presume was a prior and paramount lien, advanced the money which

created the property itself. "A mortgage was given duly recorded and a mechanic claimed priority. (I am citing now, from Phillips on Mechanics' Liens, Sec. 20, 230.) It was adjudged that when a party claimed the benefit of the lien, he must show that he has strictly complied with all the prerequisites of the law, the aid of which he invokes, and however just and equitable may be its operations between the owner and mechanic, care must be taken not to extend it beyond its legitimate scope to the prejudice of third persons who have no means of knowing of the existence of such incumbrances, save as the statute points out."

Finally, under this head, I say there is no moral obligation which requires the mortgagees to assent to the priority asked for in regard to these claims. Thus it was held in Bolton vs. Johns, 5 Penn 145, that "There is no moral obligation on a purchaser to liquidate a claim even with actual notice of its existence, which on its face was no lien at the time of his purchase."

Is there *any* moral obligation which these bondholders have towards these laborers or these supplymen? There is certainly no privity of contract between them. I have endeavored to show that there is no equitable lien arising from the fact that their money contributed towards the building of a road or its operation. Is there, then, any moral obligation whatever upon these bondholders, which will induce a Court of Equity to enforce this so-called equity against the complainants now seeking for relief? Is there any moral obligation to support any such rule in this case? I fail to see it.

Now, if your Honors please, I submit that the practice against which this argument is directed would never have been tolerated as much as it has, although founded on consent, had not confusion arisen between the duties of the Court in the management of the property in which, undoubtedly, there is a wide field for discretion, and its duties in the distribution of the sale proceeds, or the income

proceeds, in which discretion has no place; and in aid of an attempt to clear up that confusion, I propose to state our views as to the relation which Courts sustain toward this kind of property.

In the first place I recur to the proposition I insisted upon at the onset, namely, that the Court, in taking charge of the property, and in managing and selling it and distributing the sale proceeds, acts for the trustee in the mortgage, and, in the stead of and for the benefit of such trustee, enters and takes possession of the mortgaged property, as to which I cite Am. Bridge Co. v. Heidelbach, 4 Otto, 800.

Now, your Honors will see that we dispose at once of the idea which has been insisted upon by the learned counsel on the other side; that there is a difference between the corpus of the property and income of the property after the entry or the appointment of a Receiver. The mortgage after entry or after the appointment of a Receiver, covers income equally as it covers the corpus of the property. Your Honors will see in the case I have cited that the Supreme Court group together the entry by the trustees or by the mortgagees and the possession of the property by a Court under its Receiver, appointed on application of the mortgagee.

Let it be granted that the Court takes charge of the property by its Receiver in lieu of entry by the Trustee's complements, then it follows, of course, that the Court in executing that trust must be bound by the principles governing ordinary trustees.

The *cestuis que trustent* for whom the Court holds the property, are the holders of the bonds, secured by the mortgage in the first place; and in a secondary sense the mortgagor and others interested in the property. Its duties to the different classes of *cestuis que trustent* are different. As to the holders of the bonds secured by mortgage under foreclosure, the duty is an active one—to do all

that is proper to make the property repay the debt. Its duty to all others is rather passive—to refrain from doing that which unnecessarily injures them. The most liberal rule which can be claimed is, that the Court holds the trust estate for the benefit of all who are interested in the property in the order of the priority of their claims upon it, as established by law.

As to all parties it can count as items of expenditure only such payments as are made to benefit the property. It has in its capacity of Trustee duties to none of these parties, except as they grow out of the legal condition of the property.

It must determine what the property is which comes into its hands. It must make expenditures only to protect, improve and make productive this property, whatever it is. It cannot change the character of the estate by virtue of its possession as Trustee, nor encumber it except for purposes of preservation.

The Court in its capacity as Trustee has two distinct classes of duties: *First*—to manage the trust estate so that it may produce the largest return; and, *Second*—after the property has been sold, to distribute the proceeds of the sale among the several classes of *cestuis que trustent* according to their relative legal rights.

Under the first class comes the duty to operate and maintain the road, and the correlative right to incur debts for operation and preservation, which shall be entitled to first payment from the fund; to make repairs, to buy or hire rolling stock, and employ laborers and agents. In this the Court, as trustee, has the right and indeed the duty to exercise a liberal discretion.

Under the second class comes the judicial duty to determine the order in which the net proceeds of the property shall be distributed. By net proceeds, is meant the proceeds after deducting payments made on account of the expense incurred by the court in the management of the trust, includ-

ing Receiver's expenses and costs of the Court. In the distribution of such net proceeds, the Court can exercise no discretion. It must follow the legal rights of the different classes of *cestuis que trustent*, as they stand in relation to one another. The money must be distributed according to the priorities as they exist under the law. The Court cannot in its discretion create priorities or liens in conflict with, or independent of the legal rights of the parties as they stood when it took possession.

I submit to your Honor that this distinction is important as answering the erroneous argument derived from confusing the two classes of duties of the Court.

The income of the property during the Receivership is subject to the same rules as to its management and distribution, as the property itself. There is, in respect to the income, discretion to be exercised in seeking to create or increase it; no discretion as to its distribution. Or, in other words, the property and its accretions constitute but one whole, making the trust estate.

The mortgage gives the trustee the right in case of condition broken, to take the management of the property and apply the income to the mortgage debt, instead of allowing the income to be disposed of by the mortgagor. Until the mortgagee enters the income is free; but after entry it is seized upon to be applied to the mortgage debt.

It is true that until such entry by the Trustee or by the Court in its behalf, other creditors of the road have a right to such income as creating a fund from which their claims may be paid, provided they take steps to see that the Company so apply it; but not afterwards or otherwise. A lien upon the income is created by the mortgage. The date of its inception is the date of the mortgage, or as to parties not having actual notice of the mortgage, the date of the recording of the same; but the lien does not become perfect until entry. From the date of the mortgage the lien exists, to be perfected at once upon entry, accord-

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ing to the terms of the mortgage. After entry the lien upon the income is as full and complete as that upon the land itself with its appurtenances.

While this rule that the income before the entry may be applied by the mortgagor without interference from or reclamation by the mortgagee may, by the greatest stretch of interpretation, give color to the right of material men and laborers to have such income in the hands of the Company applied for their benefit, it does not imply or grant the right to charge such or any other debts of the Company on the *corpus* of the estate, or on the net income after entry or receivership, or to claim from the fund arising from the sale under foreclosure, payments which, with due diligence, might have been collected from net income received by the railway company.

Payments for past labor and supplies cannot be upheld as coming under the first class of duties and powers—those in respect to management, protection and improvement of the property. It can hardly be said that the trust estate will be benefitted by paying money for labor whose results have already been accomplished, or for materials, supplies or equipments, already a part of the property covered by the mortgage and held by the Court in its capacity as Trustee.

It may be a question whether it is fair, or whether it is not hard, that parties should not be paid for that which has already gone to increase or improve the trust property. But it is not to be doubted that the trust estate will not be benefitted by paying from it for that which is already in the possession of the Trustee discharged from any lien except that of the mortgage sought to be foreclosed.

Now, if your Honors please, just there I most respectfully submit—I know not what the experience of your Honors may have been, but I am sure if it has not fallen within your fortune to be vexed by these Receiverships, sooner or later you will be—that the recent notion of Courts

running railroads for an indefinite length of time, is one which is fraught, not only with inconvenience to the Court itself, but leads very often to the throwing aside of proper principles in the administration of justice.

We contend that Receiverships of railways should only be granted in cases of emergency, and where the mortgagee shows either insolvency, fraud, waste, refusal to apply the income to payment of interest, or inadequate security. The modern idea of appointing a Receiver of a railway to operate it for an indefinite time is founded upon a misapprehension of the true function of such a Receivership, and only entails needless trouble and annoyance upon the Courts. It is no part of the legitimate functions of the Court to operate a railway in order to produce a fund to liquidate past indebtedness. The fund the Court derives from the operation of a railroad after the appointment of the Receiver, is just as much subject to the lien of the mortgagees as the corpus of the property. If it becomes necessary, in order to keep the road going, that the Court should incur obligations for present supplies, or for present labor, as a matter of course, that is part of the operating expenses and is a charge upon the fund. But that rule does not apply in reference to the past indebtedness. Because the non-payment of the past indebtedness can, in no sense, prevent the purchase of new supplies or the employment of new labor. Lord Chancellor Cairnes, in Gardner v. L. R. 2 Chan. Appeals says: "Nothing is better settled than that the Court does not assume the management of a business or undertaking, except with a view to the winding up and sale of the business or undertaking. The management is an *ad interim* management; its necessity and justification spring out of jurisdiction to liquidate and to sell; the business or undertaking is managed and continued in order that it may be sold as a going concern, and with the sale the management ends." And Judge Miller, in Railroad v. Soulter, 2 Wall 510, says: "The appointment of a Receiver

by the Court to manage the affairs of a long line of railway, continuing through five or six years, is one of those judicial powers, the exercise of which can only be justified by the presence of absolute necessity." In the case of Myers vs. Johnson, in the American Law Times for April, 1877, which was cited by the learned Counsel yesterday, your Honors will find the same idea embodied and enforced. And right here, if your Honors please, without stopping to allude to it more in detail, this whole subject has been most elaborately reviewed in an opinion of Judge Barrett, of the Supreme Court of the State of Vermont, in the case of a Receivership which has been running in that State from time immemorial, until it has reached most gigantic proportions. That opinion exposes the iniquity which grows out of the operation of railroads by Courts of Justice. But I take it that after your Honor's experience of the past few years you no longer desire to devote the whole time of the Federal judiciary to the management of railways.

JUDGE DRUMMOND:—I would be very glad if we could have the jurisdiction taken away from us. You cannot say anything in regard to that which I don't feel. The trouble about it is this: It is not their coming into Court to get Receivers appointed to liquidate back claims, but generally they come into Court to prevent the floating creditors from seizing the property. That is generally the reason why they come into Court. It is to protect the property against these claimants who are suing them, getting judgments, issuing executions, and in order to get rid of them, they come into Court and have a Receiver appointed. Then, of course, the property is safe. Of course, then, I agree, comes up this question of back claims. But that is not the main motive, I think, for which, as a general thing, the bondholders come and ask the Court to take possession of the railroad. It is to protect their property from these

claimants who are like a set of hungry wolves who are after every thing they can get.

MR. GREEN: That is nothing more than what is said by the Supreme Court of the United States; it is throwing around the naked legal right of the bondholders, or of the Trustees, the protection of a Court of Justice. And if I be right, and I think I am, in asserting that the principle of those decisions is that the possession of a Court is nothing but the possession of the mortgagees, then the Court, in the administration of the trust, acts in the place of a trustee, and is to be governed as to the property by the same rule which governs trustees or mortgagees in possession.

JUDGE DRUMMOND: I will say that one reason why these railroads are so long in the possession of the Court, is on account of the party out of whose custody we take them. We have, I believe, in this Circuit not less than twenty railroads in the possession of the Court, and their income is a good deal over twenty millions of dollars. This Indiana, Bloomington & Western Road has been in the possession of the Court about four years. I have threatened in some instances, to turn them back into the hands of the bondholders, but you see there are so many conflicting interests among the bondholders themselves. The road had been mortgaged in parts, and that circumstance gives rise to a difference of opinion and conflicting interests. I know it takes up a large portion of my time, and I would be very glad if every railroad in the possession of the Court was sold out and turned over to the proper owners. Then we would be able to attend to something else. Now, I am hardly able to do any other kind of business. I make these remarks for the purpose of showing you that we feel the anomalous position we occupy as a Court in relation to these railroads, and so far as we can, we struggle to get rid of them, to have the decrees entered, the foreclosure completed and sale made as soon as possible, as soon as we can consistently in adjudicating the rights of all.

MR. GREEN: Of course your Honors will never relieve yourselves of the management of a railroad when it is once assumed until the Court gets itself out of debt; and that is the difficulty here. If your Honors will only discharge us from the debts of this Receivership, we will undoubtedly apply for permission to allow the mortgagees to enter into possession. I do not include, of course, in the debts of the Receivership, these back claims. That is another and different thing. I have endeavored all along in the course of my argument, to separate that thing in my own mind, and I trust in the minds of your Honors, as depending upon entirely different rules of law.

I admit to the fullest possible extent that the debts of the Court incurred in the actual management of the property during the time that the property is in the possession of the Court, are to be paid out of the fund primarily. Because I assume that no Court will allow its Receiver to incur any indebtedness which is not for the preservation of the property. Some indebtedness of Receivers, which has grown up to such a large volume in this country, has been outside of this rule; but I humbly submit to your Honors that there is no principle of law or equity which justifies the incurring of Receiver's obligations or the issuing of Receiver's certificates for a single dollar above the legitimate operating expenses of the Receivership, and such money as is actually applied for the preservation of the fund or property in the hands of the Court. And on that subject, in passing, I beg your Honor's attention to consider what is said in the opinion of Judge Barrett.

JUDGE DRUMMOND: That is the Vermont Central case, I suppose?

MR. GREEN: Yes, sir; and if your Honor knows any thing about the history of that case, it is just one of those which illustrate the wrong which sometimes grows up under the shadow of judicial administration of railroads.

JUDGE GRESHAM: I think that was in the hands of the Court some twelve or fifteen years.

MR. GREEN: Yes, and insensibly it grew out of an incidental matter. One railroad corporation leased its railway to another railway corporation. Default of rent occurring, an application was made to the Court for the appointment of a Receiver to run the leased property and apply the net earnings to the payment of the rent. Well, in the spirit of extension, which as I think my friend Mr. Butler justly said, reaches out beyond its legitimate boundaries, this Railroad receivership has leased roads, and built new lines, until from a very slender foundation, arose that large net work of railways known as the Vermont Railway system growing up under the protection of the Court, but really only founded upon consent orders and consent decrees, the Court simply acting as the recorder of the agreements of the parties who came before it; just exactly as they do under the civil code system, when the parties go before a Notary Public, who records their deeds under some quasi judicial sanction. Your Honors will pardon me for this digression.

I now come to review some things that were said by Counsel on the other side. It is said in a brief with which I have been furnished, "that under a mortgage, until action by the Trustees upon the Company's default, or until this Court though its Receiver assumed the administration of the property, the Company remained in possession, operating the road for the benefit of the bondholders, who were to have the net income. The Company, its stock holders and directors, had thus a trust to discharge to the public and a trust to the bondholders." Now, I think that this is hardly consistent with what is said somewhere else, in the same brief of my learned friend, that according to the trust of the mortgages the income belonged to the Railroad Company, and he cites from the provisions of the mortgage on that subject. "Until default in payment of the principal or

interest of the bonds, the Railway Company shall be suffered and permitted to possess, use, occupy, manage and operate said railway, property and franchises and appurtenances, and to renew, replace and repair the same and every part thereof, and take and receive and use the tolls, rents, issues, incomes and profits thereof, and dispose of the same in any manner not inconsistent with said mortgage." Is the first statement accurate? Does a mortgagor Company operate the road for the benefit of the bondholders secured by the mortgage? Have the bondholders an absolute lien on the net income before entry or the appointment of the Receiver? Can the bondholders recover the net income before entry or the appointment of a Receiver? I read to you what is said in 4 Otto 800 on that subject, where the Supreme Court of the United States hold that "upon a default, the mortgagees have the option to take personal possession of the mortgaged premises, or file a bill, have a Receiver appointed and the possession delivered to him. In either case the income would thereafter have been theirs. Until one or the other was done, the mortgagor was owner to all the world and entitled to all the profit made." In Gilman vs. Telegraph Company, 1 Otto, 616, the Court say: "A mortgagor of real estate is not liable for rent while in possession. He contracts to pay interest and not rent. It is clearly implied in these mortgages that the Railroad Company should hold possession and receive the earnings until the Mortgagees should take possession, or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. Without this the road could not be operated and no profit could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road will not be questioned. The amount to be so applied was within the discretion of the Company. The same discretion extended to the surplus. It was for the Company

to decide what should be done with it. In this condition of things, the whole fund belonged to the Company, and was subject to its control. It was therefore liable to the creditors of the Company as if the mortgages did not exist." So I submit, that until the appointment of the Receiver, the income was in the possession of the Company, and although by the terms of the mortgage the Company might be compelled to disburse it in payment of the interest, still if it did not so dlsburse it, that undoubtedly was a question between it and the bondholders, and not between the Company and the Western Car Company or the unsecured debtors. The only result of the bondholders not insisting on the application of the income to the payment of interest, is to leave the mortgagor while in possession, free to use the income in payment of debts, in improving the property or in any other legitimate manner consistent with the purposes of the corporation or within its legal powers.

Then my learned friend goes on to say that "practically it is usual for bondholders, either through representatives in the board or otherwise, to dictate and control the policy and management of the Company and the railroad." And he founds upon that an argument, outlined also by Mr. Butler. He alleges that the income was misapplied by the Railway Company, and then insists that these claimants, for that reason, are entitled to be paid out of something in lieu of the income thus misapplied. Is the allegation of fact true? Is there any proof here that the bondholders had any representatives in the Board of Directors of the Railroad Company? Is there any proof that the bondholders dictated or controlled the policy and management of the Company or the railroad? No one could act for the bondholders but their trustee, the Farmers' Loan and Trust Company, and it is not contended that either it or its officers had anything to do with the management of the Railway Company. In connection with this it is added that "the bondholders have the best oppor-

tunities to ascertain the exact financial condition of the Company, its debts and obligations, from time to time; a position of advantage that men furnishing labor, cars and supplies do not occupy." What shall be said of this argument as to the Western Car Company, when the evidence is considered which shows that the officers of the Railroad Company and the Western Car Company were identical? Look at it. Put before your minds in parallel columns:

Railroad Co.	Western Car Co.
B. E. Smith, President.	B. E Smith, President.
C. W. Smith, Gen. Man.	C. W. Smith, Gen. Agt.
C. R. Griggs, Vice Pres't.	C. R. Griggs, Associate.
W. H. Smith, Director.	W. H. Smith, "
Wm. Denison, "	Wm. Denison, "

And yet this Car Company turns around and says to the bondholders that "practically you ran the Railroad Company;" and that "you occupied the best position for learning the financial condition of the railroad." Did this Car Company not have the best opportunity for ascertaining the exact financial condition of the Company? Did it not have "a position of advantage which was not occupied" by the bondholders?

As regards both the Car Company and the supply men and the laborers, they knew, or could have known, if they had enquired (which as prudent men they ought to have done), the financial condition of the company. The condition of the account of the Car Company shows that their car rental had fallen in arrear for many months. The Car Company claims that over $200,000 was due them prior to June 1, 1874. The pay-roll had been in arrear for a considerable period prior to July 1, 1874.

Then, an argument that the bondholders have been guilty of a suit of culpable laches is sought to be drawn from the fact, that although the interest was defaulted on the second mortgage July 1, 1874, (D., U., B. & P.,) and on consolidation mortgage October 1, 1874, the bondhold-

ers, or their Trustee, did not enter into possession, or have a Receiver appointed before November 18, 1874, when the receiver was appointed under the omnibus bill. The Trustee filed its cross-bill February 2, 1875, and had the Receivership extended under the cross-bill. A reference to the mortgages will dispose of this, so far as an entry is concerned. The Trustee has no power to enter until after six months after default, and before six months expired the property was in the hands of the Receiver, and an attempt to enter would have been a contempt of the Court whose officer he was.

So far as beginning suit to foreclose is concerned, the Trust Company exercised due diligence. The principal did not become due for failure to pay interest until after six months demand and default. These provisions making the principal to become due, on a failure to pay interest, are in the nature of penalties, and not favored by the Courts, (see Story Eq. Juris § 1219), There can be no laches under these mortgages, which are binding on the railroad company and its creditors as well as on the bondholders and their trustee, until reasonable time has elapsed for action to be taken by the bondholders, who are so numerous and scattered that the utmost diligence will often fail for months in obtaining the pre-requisite assent of a sufficient number. And if we had come in and made an application to the Court upon some sort of general equitable principle that the mortgage security was inadequate, or that there was fraud or misapplication on the part of the mortgagors, of course we would have been met immediately by the answer, "You are in a hurry." We would have been told just as Judge McLean told the complainants in the New Albany case, cited by the gentlemen on the other side, "Wait a little while."

On the other hand, the idea was thrown out somewhat inconsistently, I submit, that inasmuch as the mortgage does not allow entry until after the expiration of the six

months, therefore, the income for the six months after a default is not the property of the mortgagees; that the income not being the property of the mortgagees, and having been employed by the railroad company in extensions and betterments, which may be of advantage to the mortgaged property, the claimants are justified in seeking for the satisfaction of their claims to the amount of the income so expended, out of the body of the mortgaged property so improved. There are two answers to this: First, that the betterment of the property never creates even an equitable charge upon the property benefitted, much less does it create a lien which displaces prior legal or equitable rights; and second, that these claimants should have taken means to secure the application of the net income to the payment of the debts, before it was expended by the railroad company. If these gentlemen wished to lay their hands upon that income, they should have, with due diligence, taken the necessary steps to give them the right to lay their hands on it. But they cannot sit by and allow that income to be otherwise applied, and by reason of such application seek to create by act of the Court some equitable lien prior to the lien our mortgage has upon the corpus of the property.

Again, my friend Mr. Harrington says that the bondholders are estopped to deny the authority of the officers of the Company to act as agents for them. Why, if your Honor please, the necessities of the argument drive him even to the position that the officers and directors of the Railroad Company are the agents of the bondholders. Was ever before such a claim asserted in a Court of justice? Who created the agency? By what express authority was the agency created? What rule of law implies the agency? In Dana vs. Bank of U. S., 5 W. and S., 247, the Court referring to the decision of Chief Justice Marshall in the case of Bank of U. S. vs. Dandridge, 12 Wheat, 113, hold: "The President and directors, though elected

by the stock holders, are constituted the agents of the corporation, not of the stockholders, and derive all their authority from the act or charter. The management and direction of the affairs of the institution are committed to them by the express terms of the act of incorporation. They are thereby made the repsesentatives of it, and they also have the power to manage its concerns, and are left without control to exercise their own best discretion in doing so. The stockholders therefore have no absolute right to interfere directly with, and to exercise any immediate control over the directors in themanagement of its affairs." And if the directors elected by the stockholders are not the agents of the stockholders, with what show of reason can directors be said to be agents of bondholders who had no voice whatever in their election ?

If your Honors please, I have said all I propose to say upon this case on principle. There are some cases to which I must allude for a moment in passing. The case in Virginia of Duncan vs. Cheaspeake & Ohio Railroad Company found in 3 Central Law Journal 579, was a suit in one of the local Courts in the State of Virginia, in which Judge Welford delivered an opinion. It was a suit in equity for foreclosure of a mortgage ; and the question came up upon the report of the Receiver, asking for instructions of the Court as to the distribution of the surplus earnings of the road, and requesting to be allowed to discharge the arrears of pay due employes prior to his appointment as Receiver. Your Honors will therefore perceive it was a question as to what the Receiver should do with the income of the road. Now, my sole observation in reference to that case, is this : that the principle which lies at the bottom of the opinion, is opposed to the principle of the Federal Courts (as I have endeavored to evolve it), in regard to the income of the property and its distribution after the appointment of a Receiver. This doctrine of the Federal Courts is the foundation of my argument. I admit

that if I am not correct in the assertion, that according to the judgment of the Federal tribunals, there is no difference in regard to the distribution of the income which accrues during the management of the road, or after entry, and the distribution of the proceeds arising from the sale of the corpus of the property, then that opinion is good law, and it certainly states with great ability the opposite view to the one, which I have insisted upon. So far as its weight as an authority is concerned is also open to the criticism made in regard to most of these cases, that it was practically upon agreement. Because the opinion informs us that there is this additional fact, that there was money enough there to pay off the first mortgage, and the second mortgage Trustees did not resist the payment of these claims. The Court state, that as to the creditors of the Virginia Central Railroad Company, which were paramount, the franchises and property are abundantly sufficient to satisfy these creditors, and as to the bondholders of the Chesapeake and Ohio Railroad Company, who were the only parties who could be ultimately affected by the payment of past labor claims, their assent was given to the entry of the order authorizing the Receiver to satisfy those claims.

Next we come to the Kentucky case of Douglas vs. Cline, 3 Central Law Journal 659, 673. That is the opinion of the majority of the Court. The dissenting opinion is to be found on page 703. This was a case only as to the administration of income; there was a surplus there. It was an application for payment of wages of employees for work performed after default in payment of interest out of surplus funds which had accrued from the management of Receiver appointed by the Court. The decision of the majority of the Court is based upon the supposed right of the Chancellor to impose conditions upon granting a Receivership. This insistment, it is submitted, is

successfully controverted in the able dissenting opinion by Judge Cofer.

Your Honors are referred to cases arising under the Iowa statute, giving liens to mechanics. They are Nelson vs. The Iowa Eastern Railway Company, reported in 3 Central Law Journal, 741, (44 Iowa, 71) and Taylor vs. The Burlington, Cedar Rapids & Minnesota Railway Company, reported in 4 Central Law Journal, 536. In the Nelson case, the Supreme Court of Iowa held that there was a lien upon the railroad property, but it was subject to the mortgage. Upon a re-argument, however, the Court decided that inasmuch as the railroad had been partially graded before the execution of the mortgage, the improvement had been commenced within the meaning of the statute, and therefore the lien had preference over the encumbrance created by the statute. This statute differs in every material respect from the Illinois Mechanics' lien law. Its language is quoted in the opinion of Judge Dillon in the Taylor case, which I shall read to your Honors. The Taylor case was decided subsequently to the Nelson case, and as will be perceived, the decision turns not upon any general equitable principle or any supposed analogy from the statute, but depends simply upon the construction of the phraseology of the Iowa law, as established by the highest Courts of the State. This construction, as well as the determination of the State Court upon the point whether railroads were included within the word "improvement" according to the legislative intent, was binding upon the Federal Court, and of course was followed by Judge Dillon. I can best set forth the whole matter by reading from the opinion of that distinguished Judge in the Taylor case. He says " In the various railway foreclosure cases in this Court, there are probably forty intervening petitions filed, seeking to establish on behalf of the claimants mechanics' liens on the property covered by the railway mortgages. The Trustees in these mortgages resist the right

to any lien whatever in many cases, and particularly resist the establishment of a mechanics' lien in any case where the labor was done, or the materials were furnished after the recording of the mortgage, which shall have priority over the mortgage. There are also questions as to the liens for repairs after the road has been completed, as distinguished from the right to a lien for original construction, and questions also as to limitation of the lien of the mechanic. The most important of these questions are presented in the case of Wells, French & Co., and that has, therefore, been selected as the one in which to state the conclusions at which the Court has arrived. In many respects no two things are more unlike than the erection of an ordinary building and the construction and equipment of a line of railway, and much of the difficulty in construing the legislation of the State has arisen out of the grouping of the two by the legislature, and making a uniform or single provision for both. The duty of the Court is to feel its way to the legislative intent, and give that intent effect as far as it may. Wherever the statute has been construed by the Supreme Court of the State, that construction will be accepted as a rule of decision by this Court. While we have considered every decision of the State Supreme Court which bears upon the question before us, and also the full and exhaustive discussions of Counsel, it is not proposed to go into an elaborate exposition of the different provisions of the statute, but mainly to state the results to which our examination has brought us. Section 2139 first provides for the priority of mechanics' liens as among themselves, making the same depend upon the order of filing, and then proceeds to enact that such liens "shall be preferred to all other liens and incumbrances which may be attached to or upon such building, erection, or other improvement, and to the land on which the same is situated, or either of them, made subsequent to the commencement of said building, erection or improvement." The

lien extends to the entire land to the extent of the interest of the person for whom the mechanic did the work or furnished materials, and to a leasehold interest, as to which the provision is that the forfeiture of the lease shall not impair the mechanics' lien as to the buildings, but the same may be sold to satisfy the lien and be moved off within thirty days after the sale. (Sec. 2140) We hold, Section 2139, contemplates and provides for a case where, at the time of the commencement of the building or railway, there is no recorded lien or incumbrance thereon, and where such lien or incumbrance is created subsequent to the commencement of the building or railway, in which case the mechanic has a lien which relates back to the commencement of the building or railway, although the particular work of that mechanic was done, or his materials were furnished, after a mortgage was recorded or lien created.

"As to an ordinary building, the proposition just stated admits of no doubt, indeed, it has been expressly decided to be correct by the Supreme Court of the United States, in respect of an enactment copied from the Iowa statute, Davis vs. Bisland, 18 Wall, 659. As to the application of this principle to railways, the decision of the Supreme Court of Iowa is conclusive, Nelson vs. Iowa Eastern Railway Company, September Term, 1876, 10 Western Jurist, 604; 3 Cent. L. J., 703. Construing section 1853 (the same as section 2139 of the code of 1873), it was decided in the case last cited, that the lien of the mechanic dates from the commencement of the railway, treating it as an entirety, and has priority over a mortgage executed after the work of constructing some portion of the railway has been commenced, and before the particular work was done or materials furnished for which the mechanics' lien is claimed."

But if your Honors please, one who was looking for the proper principles which should control these cases, would, I submit, find them rather in the earlier opinion of the Su-

preme Court of Iowa, at its October, 1875 Term (2 Central Law Journal, p. 739) where Judge Day holds, "the plaintiffs are affected with knowledge of the existence of the mortgage, and seeing that the road had mortgaged all its future acquisitions, they could, and should have protected themselves by refusing to sell the ties without payment or security. It surely cannot be claimed that the plaintiffs in virtue of their lien, are in any better position than would be a second mortgagee of the road. Could such mortgagee claim priority over a holder of a bond secured by the first mortgage, but not negotiated until after the second mortgage was issued? It seems to us that to such person it would be said: You saw the record of the prior mortgage, knew what it was given to secure; you voluntarily advanced your money subject to the prior incumbrance, and you cannot now be preferred to any part of it.

"In Gretchell and Tichnor vs. Allen, 34 Iowa, 559, it was held that a mechanics' lien for work or material furnished in making additions or repairs to a building is not entitled to preference as against the building, over a prior mortgage on the premises. In that case it was said: After the improvements are made they do not remain separate and distinct from the building; they have lost their distinction; the house includes them; they are a part of the house, and as such included by the mortgage, for the reason that the mortgage binds the improvements as a part of the house, the mechanics' lien cannot defeat the mortgagee's right. This case must be right upon principle, for otherwise the mortgagor might at pleasure, by making extraordinary improvements, absorb and defeat the security of the mortgagee.

"Whenever the acquisition becomes so attached to the principal thing as to become a part of it, the prior mortgage fastens to it, and the lien of the mechanic or material man is postponed to that of the mortgagee. This is the result of the decision in 11 Wallace, 459, and of our own

decisions in Gretchell and Tichnor vs. Allen, *supra*, and they are, it seems to us, based upon the soundest principles of law and reason."

Then, if your Honors please, we come to another case cited by my learned friends on the other side. The case of Duncan vs. Mobile & Ohio Railroad Company, 2 Woods, 545, which I cannot see is any authority for them. I shall not trouble your Honors with reading it in full. I simply want to call your attention to the fact that although a floating debt was contracted in good faith and went for the benefit of the bondholders partly and chiefly, by paying their interest coupons, and as to the residue by the improvements and betterments of the railroad property, yet the Court held that that was not a ground on which the floating debt creditors could claim that their debts should be first paid. Judge Woods says: "I do not understand that the floating debt creditors to claim this application of the income of the road as a legal right; it stands simply on the ground that to refuse payment would be inequitable, but I cannot invade the legal rights of others to relieve the floating debt creditors from the position in which they have voluntarily placed themselves." So, although the Master reported in favor of paying the floating debt creditors, the Court said that it was without any power to make the decree recommended by the report. To undertake to do it would be to invade the legal rights of the bondholders, and if established, as within the power of a Court of Equity, would shake the credit of railroad securities throughout the world.

Then, if your Honors please, I come to the case of Denniston *vs.* Railroad Company, 4 Bissell, 415, where your Honor, Judge Drummond, says:—"Here were large mortgages upon this Railroad which had become hopelessly insolvent. Application was made to the Court to put it in the hands of a Receiver in order that it might be operated for the payment of these mortgages. It was so done.

It remained in the hands of the Receiver for some years. Subsequently other creditors applied to the Court, it being manifest that the mortgages could not be paid that way, or at any rate that the time would be so long that it was desirable for the interests of all that the administration of the road should be changed. They asked the Court to order the property to be sold so that the parties in interest might realize upon their claims. It was accordingly sold, and the fund arising from the sale came under the control of the Court. Now what equitable lien had these petitioners on that fund? None. Why? Because those who had prior liens came in and swept it away, and, more than that, have not perhaps been half paid. It is precisely like the case of a man who furnishes to the owner of a farm the means of carrying it on, but there is another party who has a lien upon the farm, and it is sold in order that the party who has the prior lien may be paid. Now, the fact that the mechanic or laborer has furnished the means of carrying on the farm, would not authorize him to come into a Court of Equity and cut off the prior lien which exists on the farm and prevent it from being paid. These parties ought to be paid. They have a just claim against the road. But it is against an insolvent corporation, and they ask parties who have a prior right and lien, to pay them, because those with whom they have dealt cannot do so. Upon general principles I hold what I have always held in all cases of this kind, that the party who has the prior lien is entitled to the preference, and this preference must prevail as against all except specific liens, and these, of course, have to be paid in their order."

What is there in this authority to sustain the judgment in the present action? Here our learned friends ask the Court to sustain a fancied equitable lien upon a fund to arise from the sale of the mortgaged property and which

thus came under the control of the Court. This your Honor refused to do in 4 Bissel because you would not interfere with the rights of prior lienors; holding—as I trust your Honor will always hold, as you have always held in all cases of this kind, upon general principles—that the party who has the prior lien is entitled to the preference, and this preference must prevail as against all except specific liens, and these, of course, have to be paid in their order.

We are also referred to the case of Scott *vs.* Clinton & Springfield Railroad Company, in 6 Bissell, 535, where your Honor, Judge Drummond, said:—

"It is true, that we have, as a sort of necessity of the case, and yielding to some extent to the statutes of this State, where supplies and materials have been furnished to a railroad, and the diligence required by the statute has been used by the creditors to enforce their claims within six months, allowed the payment of those claims which perhaps is stretching the principle referred to as decided by the Supreme Court beyond its legitimate operation."

But the cases at bar exhibit no diligence such as is required by the statute. The creditors did nothing to enforce their claims within the six months, and, I respectfully insist, that it would indeed be stretching every principle of the lien law itself beyond its legitimate operation, to decree the payment of any one of these claims, when no steps have been taken either to create or enforce the alleged lien.

If your Honors please, my learned friend, Mr. Butler, called attention to the case of Meyer *v.* Johnson, reported in the American Law Times for March, 1877 (53 Ala., 237). It is also relied upon by his associate, Mr. Harrington, in the brief with which we have been furnished, as supporting the claim of the Western Car Company for car rental for the six months prior to

the appointment of the Receiver. The last named gentleman appears to place his argument upon the idea, that it seems, as he says, to have been intended that the proceeds of the Receiver's certificates should be used in part in enlarging and completing the work beyond what was necessary for the preservation of the property. But, if your Honors please, whatever may have been the intention, the case shows that the money was not used for that purpose, but for the purchase of locomotives and other rolling stock and equipment. Moreover, the order was granted evidently upon consent, and the learned Judge who delivered the opinion most clearly defines the limits to the power of a Court of Chancery in this regard, and expressly bases his assent to the validity of such Receiver's certificates upon the circumstances, that the first mortgagees are the actors in the transaction, and that express consent is given by the parties interested or their Trustee. Mr. Justice Manning, in his able and exhaustive opinion, so forcibly sets forth the true doctrine on this subject, that I crave the indulgence of the Court while I read a few passages from it. He says: "We presume it may be considered as settled that a Railroad Company which has executed a first mortgage of its railroad, constructed and to be constructed, and thereby raised a large amount of money to aid in the building of it, cannot afterwards give a security to another, even to one who is engaged to build an unfinished part of it, that shall have precedence of the older one. * * * * If the Railroad Company itself—the corporation created by the State, to build, equip and operate a work useful to the public, though belonging to the Company—cannot, when its enterprise is about to fail and its labor and expenditures to be lost, give to those who shall then come to its aid, and help to complete it, obligations which, like those given by the master of a vessel abroad and in distress,—shall have priority over others previously contracted,—what

prerogative of a Court of Equity entitles the chancellor to step in and do so instead of the Company? The Company may not do so, because, holding that contracts should be inviolable, the law will not permit the obligation of them to be impaired. The Constitution of the United States inhibits even a State from doing an act which shall have that effect; and, certainly, a Court which is a portion of the government of a State, cannot have a power which is denied to the State in convention assembled. If, therefore, the action of a chancellor in this cause goes to the extent of taking the property of the defendant corporation into his hands for the purpose, through his appointees, of completing an unfinished work, or of enlarging or improving a finished one, beyond what is necessary for its preservation, and to that end of raising money by charging the railroad and its appurtenances with liens which are to supersede older ones, without the consent of the holders of these, he has inadvertently passed beyond the boundaries of a chancellor's jurisdiction. In our opinion, no such power is vested or resides in any judicial tribunal."

I invite your Honors to a careful perusal of this opinion of Judge Manning, which contains a most exhaustive review of the cases which involve the question of Receivers' certificates, and accurately states the rules of law, as I humbly conceive them to exist, as to the rights of mortgagees and the powers and duties of Courts in regard to railroads and their operation while in the possession of Receivers.

My learned friend, Mr. Butler, cited the case of Stanton vs. Alabama & Chatanooga Railroad Company, 2 Woods, 506, which your Honors, will find on examination, is not antagonistic to the views I have advanced. In that suit brought to foreclose the first mortgage, the bill prayed for the appointment of a Receiver, with power to borrow money, and with such other powers as might be necessary to cause the property to be protected, improved and ad-

ministered under the further order of the Court, and that in the meantime the road should be operated, and the business of the Company be prosecuted to the greatest advantage for the benefit of all interested. The solicitors for the second mortgage bondholders, who were defendants in the cause, united in the application for the appointment of Receivers as prayed for. There were also annexed to the bill numerous affidavits showing the dilapidated condition of the road, and the absolute necessity for the preservation of the property that the order should be made. The order provides that the money borrowed by the Receivers for the purposes named, shall be a first lien, to be paid out of the proceeds of the property. It is to be observed also that the Court required that the Receivers' certificates should be countersigned by the Trustees of the first mortgage, who were the complainants in the cause. The most astute advocate will fail to find in this case the slightest warrant to support these alleged liens of laborers and supply men, or of the other claimants now under consideration. All the Court authorized to be done in that case was the preservation of the property in its possession. This it had the right to do on principle and by precedent. The order was asked by the parties having the first lien, and assented to by all parties interested. This is quite another and different thing from displacing a prior lien without the assent of the lienor, and without the justification for the creation of a Receiver's debt, which can only be found in necessities arising from the preservation of the property. Moreover, the very next case in the same volume, page 519, shows that the learned Judge was well aware of the impropriety of the Court in attempting to create a lien paramount to that of the bondholders without their consent. He says, "the exercise of power by a Court to displace liens, can only be sustained on the ground of actual necessity, and surely there can be no necessity to append, as an incident to running a railroad, a lien for damages that displaces existing

contracts. The party has a right to be paid from the fund remaining after satisfying prior rights."

Now, then, if your Honors please, I submit that a review of all the judgments which bear upon the subject demonstrates that there is not a single case which ever came before the Court where this question was decided after argument, with the exception of the Kentucky case, and of the case of Fosdick vs. The Chicago, Danville & Vincennes Railroad, in which an appeal is now pending in the Supreme Court of the United States, and as to which I do not know whether it was really argued before your Honor or not. These precise questions have never been seriously litigated or solemnly argued in any Court. All these orders, granted from time to time, have been orders by consent, or consent decrees, establishing no general principle of law or practice binding upon Courts. So that if this case is to be decided upon precedent, then I confidently submit to your Honors, that there is no precedent in favor of this claim, bringing it within the role of *stare decisis.*

Precedents founded on consent decrees establish no general rule of law or practice, binding upon Courts. Upon this subject, Mr. O'Conor in his brief in Curtis vs. Leavitt, says: "Points which pass, *sub silentio*, are not to be regarded as having been adjudged — citing 2 Johns, 36; Burr., 2,546; Corning vs. McCullough, 1 Comst., 75; People vs. Corning, 2 Comst., 15; Riley So. Car R., 111; 2 Phillips, 738. And if there appears to be any arrangement to glide over the points without debate, there is still a stronger reason presented for considering them open. Fletcher vs. Peck, 6 Cranch, 147, last paragraph. Butler vs. Van Wyck, 1 Hill, 416." And Comstock, C. J., says: in Curtis vs. Leavitt, 15 N. Y., p. 15, that he felt himself at liberty, when necessary, to inquire whether a doctrine, which appeared to him to be plainly erroneous, is irreversi-

bly settled by a decision where the point was neither argued by counsel nor considered by the Court.

Judge Bronson, in Butler vs. Van Wyck, 1 Hill, 461, remarks: "I find in the printed brief on the part of the defendant in error, admissions which would not be very likely to come from counsel whose client was deeply interested to uphold the judgment which was reversed. I notice, also, that some of the arguments which might very well have been pressed upon the consideration of the Court, were either very lightly touched, or entirely overlooked. I mention these things because the weight of a judicial decision may depend in a considerable degree upon the aid which the Court received from the discussions at the bar. No man can feel entirely sure in his conclusions until the subject has been viewed in all its various aspects."

In Edgerton vs. Muse, 2 Hill, S. Car., Eq., 51, the Court say: "The Court must exercise the right of correcting its decrees in *ex parte* cases, and cases by consent so long as they remain unexecuted: for although they purport to be the act of the Court, and as such have legal effect, yet in point of fact they are the mere act of the parties. Neither the facts nor the law can be said to be judicially ascertained in such a proceeding. The only restriction upon the exercise of this power ought to be the execution of the decree. It is then, that the decree ought to be regarded as final, and to be an estoppel between all parties and privies."

In Union Bank vs. Marin, 3 Louis. Ann. Rep., 34, Rost, *J.*, said: "A decree thus rendered (by consent) is not, legally speaking, a judgment. 'A judgment is the decision of a controversy given by a court of justice between parties who do not agree.' Consent decrees decide nothing. They merely authenticate private agreements, and render them executory between the parties. Their effects, as to third persons, are those of transactions made in an authentic form."

In Jenkins vs. Robertson, Law Rep., 1 Scotch and Appeal Cases, 117, Lord Romilly said: "When an action is brought and a verdict is obtained by the pursuers (plaintiffs), which is set aside, and an arrangement afterwards takes place by which in consideration of the payment of a sum of money, an interlocutor (judgment) is pronounced for the defenders, and the Court simply registers that interlocutor. Without expressing any judicial opinion on the subject, I am of opinion that it is contrary to all principle to consider that such a transaction can be treated really as a *res judicata* * * * * (the Court) has merely exercised an administrative function by recording the interlocutor which had been agreed to between the parties."

I refer also to Earl of Bandon vs. Becher, 3 Cla. & F. 508, to Gaines vs. Relf, 12 Howard, 472, 537, to Wadhams vs. Gay, 73 Ill., 415, and to the able and exhaustive opinion of Judge Barrett of the Supreme Court of Vermont in the case of Vermont and Canada Railroad Company vs. Vermont Central Railroad Company, delivered in June, 1877, and a pamphlet copy of which I hand your Honors. I also call your attention to the case recently decided in the Supreme Court of the United States, of Cochran vs. Denny, reported in the 6 Central Law Journal 26, a patent case, where an application was made to the Supreme Court of the United States for a re-argument, on the ground of its affecting other cases in the Circuit Courts. I read from the opinion of Judge Bradley:

"After a careful examination of the evidence adduced on the motion to vacate the decree in this case, we see no ground to believe that the appellants are chargeable with any collusion with the appellees in reference to the argument of the appeal. On the contrary, the weight of the evidence is that they repelled any arrangement or proposition which might look to that end. Whilst we would not hesitate to set aside a decree collusively obtained, the

proof ought to be very clear to induce us to do this at the instance of strangers to the suit, though incidentally affected by the decision of the questions involved. At the same time, as the decision in this case is made the basis of applications for injunctions against third parties in the Circuit Court, it is right that we should say that, in the argument of the appeal before us, the case on the part of the appellees was, as it seems to us, very imperfectly presented, and the evidence laid before us on this motion demonstrates the fact that the appellees, in consequence of the conditional arrangement with the appellants, which they secured before the argument was had, or for some other cause, omitted to prosecute their defense with that degree of zeal and efficiency which the importance of the case would otherwise have demanded. The result was that the labor of the Court, and its liability to overlook points of weight and importance, were greatly increased. As the case was presented to us, we see no cause for changing our views; but, under the circumstances, we think that third parties, who had no opportunity of being heard, and whose interests as opposed to the Cochrane patents are very important, should not be concluded from having a further hearing upon it, whenever a future case may be presented for our consideration."

I cite this, as the most recent illustration in the Supreme Court of the United States, of the principle that the decisions of questions never seriously litigated are not binding on the Courts, even in she absence of collusion. I do not suppose, if your Honors please, there was collusion in the Cochrane case. The opinion of Judge Bradley says there was none proven.

Then, if your Honors please, there are two other points I want to mention. One, whether these claims which have been bought at a discount, are to be allowed for at more than the parties actually paid, as to which I cited 2 Smith's

Chancery Practice, 265, and Stanton vs. Railroad Co. 2 Woods, 514.

JUDGE DRUMMOND:—I do not understand how the master allowed more than the amount of money actually paid, because, my instructions were, that no more should be allowed than was actually paid.

MR. WILLIAMS:—They allowed more in every case, I believe.

JUDGE DRUMMOND:—There must have been some misunderstanding in regard to that. I think they wrote to me for instructions, and I sent them instructions.

MR. BUTLER:—The Richards case is the only one I had anything to do with. The discount there was accounted for.

JUDGE DRUMMOND:—I certainly instructed them not to allow more than was paid. I do not think you need argue that matter.

MR. GREEN:—Then, in regard to another question, whether the promise of Wright, the Receiver, helps the Indiana Banking Company, I ask the Court to take note of what was held in 4 Bissell, 414, which settles the point.

Now, if your Honors please, I shall not add anything further of my own as to the results of the allowance of these claims. What I have said on the subject of their enormous amount will suffice. But, before dismissing this branch of my argument, I want to show you what is the effect of litigation, begun and carried on in the way this cause has been, as portrayed by an artist eminently fit to paint the picture. Your Honors will recollect that this suit was commenced by Mr. Henry Crawford, as solicitor of the Turner Brothers; I can, therefore, read from no higher authority in this case than Mr. Crawford himself. He thus speaks in regard to the beginning and ending of a litigation of the same sort,

in the brief he has filed in the Supreme Court of the United States, in the Chicago, Danville & Vincennes case :—

"Under the cover of such specious appeals to what are designated the "principles of natural equity," this class of junior claims have in many recent cases of railway foreclosures, secured judicial recognition to such an extent, that the value of the bondholder's security has been most seriously damaged, and in some instances been threatened with practical extinction. The result is accomplished in this manner. A railroad company makes default on its first mortgage bonds. It is insolvent, the security is inadequate, and there is a large accummulation of debt for labor and supplies. Suit to foreclose is instituted, and a Receiver appointed. Intervention is, thereupon, made by a legion of floating creditors. The appeals of this necessitous and clamorous class, address themselves to the sympathy rather than the judgment of the Chancellor. Yielding to the promptings of this sentimental equity, orders are entered on the petitions of the ordinary creditors, requiring the Receiver to apply the net income of the road to their payment; and if the Receiver's earnings be inadequate, it is ordered that the sale proceeds arising under the final decree of foreclosure shall be applied to their full payment before the mortgage debt. The bondholders have then no recourse but to appeal, supersede the decree and suffer the damage consequent on the postponement of the reorganization of the property for several years, or incur the heavy expense of protecting their security by raising the large sum of money necessary to clear off the allowances decreed on the junior claims. This generally embraces all labor and supply debts of the railroad company incurred in the six months anterior to the institution of the foreclosure suit, frequently aggregating several hundred thousand dollars. It is not possible to conceive of a more dangerous judicial heresy.

In the interest of the large values invested in the class of negotiable securities, it is highly necessary that this Court of last resort should authoritatively decide whether the Circuit Courts of the United States, in the absence of express legislative support, do in fact possess a roving commission to invade in such manner a security definitely fixed by law, and effect a confiscation of the vested rights of bondholders."

There has been cited to your Honors by the gentlemen on the other side, the case of Williamson agst. The New Albany &c. Railroad Company (1 Bissell, p. 198). This matter was heard before Judge McLean in October, 1857, and, although it must be confessed that there are some expressions used by that learned Judge, in the course of his opinion, which would seem to give some color to the notion that a chancellor, who has the supervision of a railroad in the hands of a Receiver, would have a right to deal with the income derived from its operation, so as to pay the floating debts; still I submit, that after the lapse of nearly a quarter of a century, in which much judicial determination has been had upon the subject, which at the time of the rendering of Judge McLean's decision was comparatively novel, your Honors will revise the judgment in that case, in the light of sound legal principle, and of the experience which has been obtained, by the frequent litigations which have since arisen, especially if you find that the doctrines of that judgment have not been so universally assented to, that they come within the requirements of the maxim, *stare decisis.*

It must, if your Honors please, also be observed, that that learned Judge, in the course of several of his decisions upon railway mortgages, growing out of the business troubles immediately subsequent to 1857, was possessed with two ideas, which materially affected his conclusions, if they did not somewhat warp his judgment. These were, first, what is undoubtedly correct within proper

limits: that a railroad is a great public highway, and that, inasmuch as there is an obligation upon the part of a corporation, to whom the State has granted a franchise to be a railway corporation, to operate and maintain its road; and, as the corporation, by reason of its insolvency, is unable to perform that obligation, the Court, when the property comes into its possession by the appointment of a Receiver, will fulfil the obligation thus assumed by the railway corporation at the time that a grant of a portion of the sovereignty was made to it. The learned Judge, who delivered the opinion in Meyer vs. Johnson, has stated this argument with great ability, but the limitation which he places upon it is not only consistent with common sense, but is dictated by principles of common honesty. He holds that no chancellor should permit Receiver's certificates to be issued without the utmost circumspection. As they are issued for urgent, pressing needs, and are to be redeemed when the litigation is ended, they should not be issued in excess of the need. Such a limited scope is all that it is necessary for the certificates to have; by enlarging it, the character which their origin should stamp upon them would be changed, and it would be impossible to preserve the value of older securities.

Your Honors will perceive that, keeping in view the proper functions of a Court in regard to railways in its possession, and always bearing in mind that the power of the Court is exhausted, so far as displacing prior liens is concerned, when it has taken care of and preserved the property, or, in the more technical language, as applied to a railway, operated and maintained it, there can be no room, even in this notion of Mr. Justice McLean, to support the claims of laborers for back pay, or of unpaid supply-men.

The second suggestion that I have to make to your Honors in regard to the prevailing ideas as to railways in Mr. Justice McLean's mind, at the time of this deci-

sion, is, that following the English notion which inhibited the sale of the body of the property, and looked only to a sequestration of the earnings in order to satisfy the debts of the corporation, that learned Judge, to use his own language in the case of *Pennock* v. *Coe*, "believed that the proper mode of enforcing payment against a railroad company, on bonds secured by mortgage, was to bring the creditors and the railroad company into chancery, where the earnings of the road, through a faithful agency, may be distributed equitably among the creditors." He adds, as it would have been impossible for so intelligent and upright a Judge not to add: "and in a case where such a course would not satisfy the reasonable demands of creditors, to sell the road and distribute among them its proceeds." But the idea of keeping the property together for the benefit of the public, of the stockholders, and of the floating debt creditors, as well as of the bondholders, is still uppermost in his mind. And, therefore, he still further adds: "such an extreme procedure, however, should not be authorized by the Court, except under circumstances of absolute necessity."

Bearing these suggestions in mind, if your Honors please, I now proceed to offer some observations upon the report in the first of Bissell.

In the first place, it is to be considered that the case made by the bill was a failure to pay interest which became due on the bonds in February, 1857, and the embarrassed condition of the company. It was an interlocutory application made at Chambers for the appointment of a Receiver. The previously accrued installments of interest were paid, or satisfactorily arranged, and the money which would have gone to pay the defaulted interest had been used for the completion of the road and its equipment, a course of conduct which was approved by the complainant and many of the bondholders; and it also appeared

that they had urged the President of the Company to go on with the work by all means, and finish and equip the road, so as to increase the revenue, and had agreed to receive bonds in payment of the interest then due.

Your Honors, will therefore perceive, that the doctrine of equitable estoppel arose, because the bondholders and their trustee had not only assented to the payment of the earnings for the completion of the road and its equipment, but they had urged the corporation to take that course, so as to increase the revenue, and had in addition agreed to receive bonds in payment of the interest due. Moreover, the learned Judge held that there had been no abuse of the powers of the Company, nor any misapplication of its funds, so as to authorize the appointment of a Receiver. The Court also say: "That the floating debt has accrued under circumstances which give a strong claim to the Company for some indulgence in the payment of the deferred interest, since the completion has added so much value to the security of the bondholders and increased the profit of the road, and especially as the work was done on the recommendation of the complainant and a part of the bondholders."

The Judge also states that from the exhibits in the case, there is a reasonable probability that in the course of a short period, a vigorous operation of the road may enable its directors to pay the deferred interest and their floating debt, and the discharge of these will make the payment of the current interest on its bonds easy out of the net profits; there is a strong probability that in a very short time, the road will be in a condition to meet its engagements under the mortgages, which is all the bond creditors have a right to demand. He is of the opinion that a change of agency would not increase the efficiency of that already employed on the road; and that "a sale of the property would in all probability sacrifice the stock of the road, and more than half, if not two-thirds of the property of the

bondholders. It might enable some one or more persons to purchase the road at an almost nominal consideration. These consequences, I admit, are not to stand in the way of an equitable right enforced under circumstances of fairness and justice. But if such results may be avoided by a short postponement of the interest, and under a prospect of a speedy payment, I hold myself authorized to do so under the facts above stated."

I respectfully submit to your Honors, that much of what is said by the learned Judge was not necessary to the decision of the motion for a receiver. There was a proper ground, upon which to place his decision arising from the fact, that the income had been diverted from the payment of the interest with the assent,in fact, at the request of the complainants. Whatever there is of mere *obiter dicta* contained in the opinion is erroneous doctrine; for, surely, in the light of the present state of the law, no Court would hold that a floating debt is entitled to any claim in preference to the rights of bondholders unless incurred with their consent or the consent of their trustee, because it had added value to their security, or increased the profits of the road.

I doubt very much whether the learned Judge himself, upon the application for a final decree, would have been willing to have postponed the rights of the bondholders, or to have refused to have enforced them, because in his opinion there was a probability, or, perhaps, only a hope, that in a short time the road would meet all its engagements; certainly no Court would now be inclined to adopt that course, when the cause was ripe for final judgment. The conclusion of Judge McLean was that, while he would afford to the bondholders every reasonable assurance that could be required, he would not appoint a Receiver at that time, but that one-half of the income of the road should be set aside to be applied to the bonded debt, and one-half to the payment of the floating debt, reserving to the bond-

holders the opportunity of renewing the application for a Receiver, if his hopes should not be fulfilled. The criticism made upon this decision by the learned District Judge (McDonald) of Indiana, in Pullan v. Cincinnati and Chicago Railroad Company, 4 Bissel 47, is worthy of repetition. He remarks that "principally, if not solely, for the single and recent failure to pay the instalment of interest the Chancellor, while *in form* he overruled the motion for a Receiver, did what was nearly equivalent to appointing one: he placed the road so far under the control of the Court, as to require that Company to make monthly reports to the Court of the net income of the road, and to pay a certain proportion thereof into Court for the use of the bondholders."

Now, if your Honors please, if this case is to be considered as an authority, let us see where the rule will lead you. The condition is broken. There is a right for the mortgagee to enter absolutely, yet a Court of Equity refuses its protection to the bondholders, who are entitled to a present entry, or in lieu thereof, to the appointment of a Receiver, because it thinks that sooner or later the Company will be able to pay. This is all that there is left of the decision of Judge McLean. Everything else contained in it, is *obiter dicta*, and has been expressly overruled by the decisions of the Supreme Court of the United States. But if your Honors desire anything in further illustration of the course of practice pursued in that case, you will find it in the subsequent proceedings relative to that railroad enterprise, as set forth in the case of Bill against the Railroad Company, 2 Bissell, p. 390, where one can perceive very plainly the results which grew out of the line of conduct pursued; and, unless I am very much mistaken, it was the course then taken by Judge McLean which primarily led to the confusion of affairs, from which, with considerable difficulty your Honors, eventually, ex-

tricated rights and priorities of those interested in the property.

If your Honors please, I will close this discussion with but a single other observation. It was argued yesterday, in support of this attempted lien, that strikes would be imminent unless these back-pay claims were satisfied; that it was necessary to violate the rights of the complainants, in order to quiet clamorous laborers, who threatened to burn down bridges, tear up tracks and destroy the rolling stock and other property of the railroad company; and, therefore, in order to preserve that property, it was requisite to pay them off, whether the bondholders consent or refuse, and thus to buy peace. Will your Honors assent to the establishment of this "lien by fright?" Has it come to this, that the Circuit Courts of the United States, with the whole power of the Federal Government at their back, with the army and navy at their command, with the *posse comitatus* of the Union under their control, will descend to treat with defiant outlaws, and in order to protect property in its possession from a mob, will buy its peace, and confiscate the very property it pretends to preserve, by creating an equitable lien from fright? Has this country gone through all these years of fratricidal war, has so much precious blood been shed, do so many noble men carry about with them such honorable wounds, has so much treasure been expended, and so much privation been endured in order to establish, as every patriotic man must rejoice has been firmly established, the paramount authority of the Federal Union within constitutional limitations, in all departments of the Government, judicial as well as executive and legislative, and are its Courts to be diverted from the application of strict legal principles and from the administration of equity in an equity cause, because, forsooth, they are afraid of a mob? Have your Honors forgotten the experiences of the strike of last summer, how it demoralized labor, put an embargo upon traffic, sus-

pended the ordinary intercourse of the land, stopped the mails, disordered all the relations of commerce and of society, and put at bay the civil and military authorities of the States? All this is bad enough; but when these riots, accompanied by inseparable arson, murder, maiming and plunder, intensified by the infamous fallacies of imported communism, overturning all rights of property, and sapping the foundation of public virtue and private honor, are to be sanctified by the fiat of judicial recognition and approval, because the judges of the country have not moral courage to resist, then, indeed, even a good patriot may despair of the Republic.

If your Honors please, I for one, protest against a doctrine which legitimately leads to such results. I have too high a regard for the Federal judiciary to believe they will ever assent to it. The protection of property against popular clamor, local prejudice and local interests. lies in the Federal judiciary. The capital of other States seeks investment here, because the men of the east know that the broad ægis of the Federal constitution is over them and their property in every place where the flag of the Union floats over the Courts of the Union. It may be a source of regret to many of us that it is so; nevertheless, the necessity for this protection by the Federal judiciary is apparent in the course of Federal legislation for the last twelve years, extending the jurisdiction of these Courts, until by the terms of the statutes conferring such jurisdiction, it embraces everything that is granted by the very words of the constitution, including among other things, the withdrawal from tribunals instituted by State authority of causes wherein suitors not domiciled in the State, may have reason to fear that the judgment of the State Courts will be warped by local passion or affected by the natural bias of neighbors towards neighbors, or by an equally natural jealousy towards strangers.

Into Federal tribunals, therefore, such litigation as the one

now before your Honors, sooner or later is sure to come. Into this tribunal we have removed this cause, confidently appealing for the administration of justice according to the fundamental principles of law and equity, confidently believing that whatever may betide suitors in other Courts, here at least, this appeal will not be made in vain.

If your Honors please, what is wanted in this country at this hour is confidence; not so much confidence in the stability of the Government as confidence in the maintainance of rights by the Government, and confidence in the recognition of law by those who are in charge of the administration of Government. It is not want of capital, it is not poverty which causes the distress so apparent around us wherever we go, in every part of this land. Capital is locked up in depositories, crops are abundant, laborers seek employment. The trouble is, want of confidence, doubts of honesty, hesitation to believe that there is indeed any honor left either in the high places or in the humble walks of life. The mischief lies in want of confidence, not only want of confidence between man and man, but want of confidence of the citizen in his Government, of which these Federal Courts form no insignificant a part. When public credit is, as it is at this moment, at the sport of the demagogue, when grave financial questions involving the plighted honor of the country are to be settled by the prejudices of the multitude, excited by heated harangues at the hustings, when the validity of the debt of the nation is attacked and repudiation of sacred obligations, both public and private, is openly commended, when laws are defied and property is despoiled under a plea of necessity, the sole refuge in the face of such dishonesty, and in the presence of such symptoms of general demoralization, is to be found in the Federal judiciary, at once the protector of human freedom and the dispenser of justice, according to law.

I earnestly beseech you, therefore, as American Judges, to administer so the law that the confidence which

is now felt in the Judiciary of the United States may, by no act of yours, be shaken or in the slightest degree weakened. In the arguments made just one year ago, before the most august tribunal that ever assembled in this country, if not in Christendom, in which the title to the chief magistracy of our Union was passed upon by Judges sworn to do their duty, foremost lawyers of the land, holding different political views, and contending before that tribunal for opposite results, united in enforcing with a wealth of words and a power of utterance to which I am a stranger, the necessity of the reliance of the people of a Democracy upon the uprightness, the fearlessness and the independence of the judiciary. Borrowing the illustration of one of them, though using it in another sense, let me, in conclusion, with the utmost respect for your Honors, remind you that it was only when the children of Israel had lost confidence in their Judges, that the people began to pray for a King.

If your Honors please, I crave your further indulgence, while I briefly recapitulate the points which I conceive have been established by this discussion. I have submitted to your Honors these legal propositions:

I. The appointment of a Receiver alters no rights and creates none.

II. Courts, in granting Receiverships, cannot impose terms and conditions which alter the rights or priorities of parties without their consent.

III. The power of appointment of Receivers, while said to be discretionary, is not arbitrary, and is only to be granted upon judicial determination of legal rights and equitable priorities, and not as matter of favor.

IV. Railroads in Federal Courts are considered real estate, and governed by the rules of law regulating that kind

of property, including statutes providing for registration and record of instruments affecting realty.

V. After acquired property passes under the lien of a mortgage professing to cover it, the moment it comes into the possession of the mortgagor company.

VI. No equity is ever created, and no lien is ever acquired by reason of the fact that the money of the claimant produced, saved or improved the property upon which the lien is sought.

VII. 1. Before entry, the income of a railway covered by a mortgage like the one in suit, is at the disposal of the mortgagor to be dealt with by it as it pleases. 2. Before entry, such income is subject, upon proper application being made by a diligent creditor by judicial process to the payment of debts due to him. 3. After entry, the income belongs just as securely to the mortgagee as the *corpus* of the estate.

VIII. The custody of a Receiver, upon the application of the mortgagee, is equivalent in its effect to the entry of the mortgagee.

IX. The Court, after receivership granted, stands in the place of the mortgagee after entry, and deals with the property precisely as a mortgagee in possession ought in law to deal with it.

X. In order to sustain the claims in this case, they must constitute a lien of some kind upon the property.

XI. Liens can only be created by statute, by express contract, or by a course of conduct from which the Courts will imply a contract or create an estoppel, which latter class of liens are known as equitable liens.

XII. In this case it is not contended that there is a lien created by statute or by express contract.

XIII. The attempt to create one by analogy from the statute fails, because 1, the claimants have neither complied with the terms of the statute, nor with anything equivalent to it. 2. No lien can be created under the Illinois statute nor from analogy to it, for work done or supplies furnished after the accruing of the mortgage lien. 3. Statutes creating liens are to be strictly construed, and parties seeking to enforce the privileges granted must bring themselves within the very terms of the statute.

XIV. Mortgages recorded before the commencement of the work, or the furnishing of the supplies, have priority over any lien which can be created by reason of the work, or the furnishing of the supplies.

XV. The statute of 1872 cannot be construed so as to defeat the prior right of the mortgagees vested in 1869. Such a construction will render the act of 1872 unconstitutional and void.

XVI. There is no power in any Court to create a lien of this character.

XVII. Most especially the Federal Courts have no such power, because (1.) these Courts have only the equity powers which were possessed by the high Court of Chancery in England acting under its judicial capacity as a Court of Equity. (2.) Liens of this kind were unknown in the common law or equity jurisprudence, both of England and of this country.

XVIII. Neither are liens of this kind within the principles relating to so-called "equitable liens."

XIX. The creation of this lien by a Court is repugnant to fundamental principles of equity—(1.) priority in time creates superiority of right. (2.) Equity follows the law, and the record of the mortgage created in law a paramount title in the mortgagees. (3.) Equity abhors secret liens.

(4.) No equity arises from the fact that the monies of the claimants contributed to the improvement of the property.

XX. The maxim that he who seeks equity must do equity is inapplicable.

XXI. (1.) No equity arises from the circumstance that the claim may conform to principles of natural justice. (2.) If it did, *bona fide* incumbrances are morally as well as legally entitled to equal protection with the mechanic. (3.) There *is* no moral obligation requiring the mortgagees in this case to waive their prior right in law in favor of these claimants.

XXII. The practice of allowing the payment of back pay and for supplies in arrears of the appointment of Receivers of railway property, is founded upon a misapprehension of the duties of Courts in the management of such property ; (as to which I cannot condense the argument already made, and will not weary your Honors by its repetition,) or upon consent of the parties. As to consent orders or decrees they establish no general principle of law or practice binding upon Courts.

XXIII. A review of the cases cited, shows (1.) that there is no seriously litigated case in the Federal Courts opposed to the principles I have contended for ; (2.) that the cases in the State Courts cited, and apparently adverse, were decided upon the phraseology of the statutes of the particular State, or were otherwise not analagous to the cause at bar.

Circuit Court of the United States,

FOR THE

SOUTHERN DISTRICT OF ILLINOIS

AND THE

DISTRICT OF INDIANA.

Malcolm C. Turner v. *The Indianapolis, Bloomington and Western Railway Company.*	**Bill in Equity.**
The Farmers' Loan and Trust Company v. *The Same.*	**Cross Bill.**

ARGUMENT OF J. AUGUSTUS JOHNSON, ESQ., ON BEHALF OF THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE:—

BEFORE HON. THOMAS DRUMMOND, U. S. CIRCUIT JUDGE FOR THE SEVENTH JUDICIAL CIRCUIT, AND HON. W. Q. GRESHAM, DISTRICT JUDGE FOR THE DISTRICT OF INDIANA,

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In the Circuit Court of the United States

FOR THE SOUTHERN DISTRICT OF ILLINOIS AND FOR THE DISTRICT OF INDIANA.

MALCOLM C. TURNER *et al.* *vs.* THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY COMPANY *et al.*	BILL IN EQUITY.
THE FARMERS' LOAN AND TRUST COMPANY *vs.* THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY COMPANY.	CROSS BILL.

Argument of J. AUGUSTUS JOHNSON, Esq., of New York, on behalf of *The Farmers' Loan and Trust*

Company, Trustee, before Hon. THOMAS DRUMMOND, U. S. Circuit Judge for the Seventh Judicial Circuit, and Hon. W. Q. GRESHAM, District Judge for the District of Indiana.

At Indianapolis, February 20, 1878.

May it please your Honors:

The proceedings in this cause were commenced by Turner Brothers, bankers, of the city of New York, in November, 1874, by filing their bill as bondholders and general creditors of the Indianapolis, Bloomington and Western Railway Company, in the De Witt County Circuit Court of Illinois. The prayer of this bill asks for the foreclosure of all the mortgages on the property of the Company, five in number, the sale of the railroad at auction for the benefit of all the creditors according to the priority of their claims, and for the appointment of a Receiver. The Farmers' Loan and Trust Company, trustee under two of the Company's mortgages, filed their cross-bill February 3, 1875, praying for the foreclosure of said mortgages and the appointment of a Receiver.

Under the original Bill, Geo. B. Wright was appointed Receiver in Illinois, and also in Indiana, under the proceedings commenced by Turner Brothers, in the Montgomery County Court. General Wright was also made Receiver under the cross-bill of the Trust Company. Among the various orders entered in the State Court was one requiring the Receiver to pay all claims for back pay and supplies for a period of five months, and this order was subsequently extended to cover all back pay and supply claims, without limit

as to time. These orders were asked for and granted without notice to the Farmers' Loan and Trust Company, whose counsel subsequently protested against the allowance of such claims, both in the State Courts and in the Federal Court, and we are here to renew that protest at this time.

In April, 1876, the Trust Company filed an amended and supplementary bill in the State Courts, and then, in the hope of better securing the property covered by their mortgages, removed the proceedings to the Federal Courts of Indiana and Illinois, and on the 19th day of July, 1876, the earliest moment at which a hearing could be had, a motion was made on behalf of the Trust Company to vacate the orders allowing claims for labor and supplies.

A decree was entered July 18, 1877, in the United States Circuit Court for the Southern District of Illinois, giving judgment in favor of the Farmers' Loan and Trust Company, trustee, for $6,232.000, with interest from that date; declaring the mortgages executed to said trustee to be first and paramount liens upon the property therein described, and ordering a sale of the property of the Company in Illinois and Indiana. This decree, among other things, directed that claims for labor, pay, and supplies furnished during the six months prior to the appointment of the Receiver, including the claim of the Western Car Company for the rental of cars during this period, should be referrred to Special Masters Mr. Livingston Howland and Mr. John D. Howland, to ascertain the value of the labor and supplies furnished. But the Court reserved to itself the right to allow or disallow the same on the coming in of the Masters' report.

The Masters have filed their reports, and we have

filed our exceptions to them, because we hold that these allowances for back pay and supplies are excessive in amount; that they are contrary to the evidence, and are opposed to the well-recognised principles of law and equity.

The claims allowed by the Masters amount in the aggregate to more than $500,000. This, added to their award in the Rogers' Locomotive case, and the outstanding certificates of the Receiver, amounts to a sum greater than can be obtained to-day for all the first mortgage bonds. To grant such claims will practically extinguish the entire first mortgage lien, and render it worthless in favor of claims which are unsecured either by judgment or mortgage. Such an allowance would do immense injustice by depriving the first mortgage bondholders of their prior equities, and by destroying the value of a first mortgage throughout this judicial circuit. Fortunately, the Court reserved its decision as to the allowance of any of these unsecured claims, under the six months' rule adopted by his Honor, Judge Drummond, in respect to some other railroads operated by his Receivers.

In view of the disastrous consequences involved in the application of this *six months' rule* to the I. B. & W. Railway, let us see on what the *six months' rule* is founded.

I have been unable to find any law or equity to support such a rule; and when asked by the Trustee, by the dismayed bondholders and the bondholders' committee, who are here to-day to protest in person against such an unjust rule, I have been unable to explain to them, or to myself, why the liens which have been declared by your Honor's decree *to be first and paramount liens* should be set aside

and postponed in favor of unsecured claims; and I cannot believe that such a disastrous step, resting solely upon the discretion of the Chancellor, will be taken. The counsel on the other side go too far when they ask the Court to take one man's property arbitrarily and give it to another, on some theory of sentimental equity! They invoke a power which the Court does not possess—a power which, if used, will destroy confidence in the courts and add to the general disturbance now so prevalent throughout the country.

If this six months' rule is not based upon law or upon the recognized principles of equity, upon what does it stand?

This period of six months has been suggested to the Court, I understand, by the supposed analogy it bears to the Mechanics' Lien Law furnished by the Illinois Statute. Let us examine that statute and ascertain if it furnishes any encouragement for setting aside prior liens, in favor of unsecured claims, or of making an "admiralty lien on wheels." That statute expressly declares that the mechanic's lien attaches from the moment the labor commences or the material is delivered, and attaches *only* as against mortgages and other liens *accruing after the commencement of said labor and the delivery of said supplies.*

Now, is it not clear from this that mortgages duly executed and recorded in 1869 cannot be affected by liens attaching in 1874? Where, then, is the analogy? If any, it is wholly against making a junior lien usurp the place of an undoubted mortgage, four years its senior. Here is the statute:

"All persons who may have furnished or shall hereafter furnish to any railroad corporation now

existing or hereafter to be organized under the laws of this State, any fuel, ties, material, supplies, or any other article or thing necessary for the construction, maintenance, operation, or repair of such roads by contract with said corporation; or who shall have done or performed, or shall hereafter do or perform, any work or labor for such construction, maintenance, operation or repair by like contract, shall be entitled to be paid for the same as part of the current expenses of said road, and in order to secure the same, shall have a lien upon all the property, real, personal and mixed, of said railroad corporation, as against such railroad and as against all mortgages or other liens *which shall accrue after the commencement of the delivery of said articles or the commencement of said work or labor*, provided suit shall be commenced within six months after such contractor or laborer shall have completed his contract with said railroad corporation, or after such labor shall have been performed or material furnished."

Rev. Stat. Ill., (1874), 671, §51.

The decisions of the Illinois Courts respecting this statute are as binding on this Court as the statute itself, and the decisions which will be cited in our brief will show that record of mortgage is notice to all persons dealing with the mortgagor; that persons dealing with the mortgagor, can acquire no rights greater than the mortgagor possesses, and that a railroad company may, by contract for supplies and labor, create a lien to the extent of its right and interest in the premises, *and no further*. These are well-recog nized principles of law, and require no argument before a Court like this.

The analogy furnished by the statute having no ap-

plication then to liens recorded prior to the supply of labor and material, the only foundation for *the six months' rule*, is the alleged usage of this Court. It is said that for many years this Court has allowed, in the exercise of its discretion, claims for labor and supplies furnished during six months prior to the appointment of a Receiver. Now, if we can show that the application of a *fixed rule of six months* in respect *to all roads alike* is unjust and inequitable, we hope that the Court will change that rule, whenever it can be shown that by its application, it will extinguish or seriously impair prior liens.

The circumstances of roads are not all alike, consequently a fixed rule is not equally applicable. Roads differ as to length, assets, resources, earnings, location and value; they differ as to the amount of accumulated debt; they differ as to the extent of corruption and mismanagement on the part of the mortgagor corporation, in making contracts with themselves and each other, and in every variety of "ring combinations," so that what might be deemed equitable in one case may be wickedly unjust in another. For example, one road may have a very honest and careful management, paying off its floating debt with great regularity, and defaulting only as to its bonded interest. In such a case the application of the six months rule, if such a rule exists, would involve a comparatively light burden, and afford an aggregate of claims for back pay and supplies, which would be smaller for six months than such claims against this road for one month.

Bondholders have sometimes acquiesced in the moral compulsion put upon them by the Court to pay back pay and supplies for six months when the burden has been light. But ours is a different case. With us it is a

case of life or death. The Court has recognized the existence of corrupt contracts between this company and other companies, the Directors being the same in both; the Court has recognized and repudiated these contracts as corrupt and against public policy.

Under these circumstances the Court in the exercise of its discretion should say that the six month's rule cannot apply to this case, because of (1) the *vast amount of accumulated debt*, (2) the *corrupt conduct and mismanagement of the mortgagor corporation*, (3) *the very large proportion which said claims bear to the present market value of the entire series of first mortgage bonds;* (4) *there is no surplus fund* in Court; (5) because the Receiver is now in debt for more than $600,000, and because (6) there are no net earnings applicable to the payment of such claims, and (7) the bondholders do not consent, but protest against, the allowance of these claims.

An examination of the Master's reports show that some of these claims are for moneys loaned the mortgager corporation during the said six months, which money it is claimed can be traced to the payment of labor and supplies during that period. The Masters have allowed these claims, and others still more extraordinary, and not coming within the purview of the order of reference.

Claims for stock killed have been allowed as "operating expenses."

Claims of assignees of laborers and supply men have been allowed, and this in face of the fact that under the Illinois decisions mechanics' liens are personal and do not pass with the assignment of the debt.

Claims of speculators who have purchased labor and supply claims at 20 per cent. discount, have been

allowed at their face value, and the claims of the Car Company for $105,480 has been allowed for car rental. If your Honors shall decide that any of these claims are admissable, we desire to be heard fully as to the facts involved in each case. Especially do we wish to be heard in reference to the claim of the Western Car Company.

This Car Company occupies a peculiar position in respect to the Railway Company. The President of the Railway Company, Mr. B. E. Smith, was President of the Car Company, and several Directors of the Railway Company were officers or associates in the management of the Car Company. Their contract for the rental of cars to the Railway Company must therefore, under the ruling of your Honors, be regarded as null and void. If an allowance is to be made to them on the principle of *quantum meruit*, it must be shown that they come within the order providing for labor, supplies, and operating expenses. We claim that the Car Company loaned their cars, as a banker lends money,—as so much capital invested. They risked their capital as the banker risks his, but with this advantage that they were entitled to resume possession of their cars upon the first default. If they secured their venture by collateral or otherwise they can avail of that security, but if they risked their capital without security, what better off are they than any other unsecured creditor? Suppose the Car Company and these other claimants had put their claims in suit and obtained judgments, or, availing of their position as Directors in both companies, they had secured their claims by a mortgage, would not such judgments-creditors or mortgagees be postponed to the prior mortgages?

If your Honors please, whatever may be the merits of the Car Company's claim as against the Railway Company in 1874, we insist that it has no standing in these proceedings for the foreclosure of mortgages placed on record in 1869. It is clear that they have no legal claims as against the mortgages executed to the Trust Company.

Have they any equitable claim? Were they in ignorance of the mortgages to the Trust Company? No, for they were Directors in both companies, and must have had actual notice. At any rate the mortgages were on record, and they had constructive notice. Was the Car Company in ignorance of the financial condition of the Railway Company? No, for the Railway Company was in arrears to the Car Company prior to the commencement of the six months. They knew of the default of the Railway Company on the interest of its bonded debt, and yet allowed their cars to remain in the keeping of this insolvent corporation month after month, when they might have resumed possession of them all, as specially provided by their contract, on default upon the bonded debt; they let the time run on, while many of their cars were lying idle on the side tracks, and many more were too dilapidated for use, as will be shown by a reference to the testimony before the Masters.

We claim, therefore, that upon no equitable ground can their unsecured claim be placed in advance of the prior mortgages. They have no prior lien, legal or equitable, and as this Court cannot create a lien, the claim of the Car Company must take its place in the order of its priority. If paid, it must be paid from the surplus, after the prior mortgages are satisfied. *Qui prior est tempore, potior est jure.*

We appreciate the embarrassment of the Court in dealing with these labor and supply claims, for the laborers are a most worthy class of people, and are entitled to sympathy, and bondholders are frequently willing to make sacrifices in their behalf; but this should be done by consent, and not by compulsion. We contend that the Court has no right to compel the payment of any of these unsecured claims for a single day prior to the Receivership; but if the bondholders are asked to consent to the payment of a certain proportion of the labor and supply claims, I do not say that they would refuse. But they must first see that the demand made upon their sympathy and benevolence is a reasonable one. The analogy of the Mechanic's Lien Law as construed by the learned counsel on the other side, is deemed to be entirely unreasonable and flagrantly unjust. If applied to this case it will destroy the value of the first mortgage lien.

The bondholders object to this alleged six months rule and protest against it.

If the Court must have an analogy to guide it in the exercise of its discretion, permit me to suggest a more reasonable measure of benevolence. It is usual with railroad companies to pay for labor and supplies at the end of each month, and until default is made, the laborers and supply men are not always aware of approaching insolvency. But when default is made in their payments, the laborers then have notice enough to warn them, and they remain in service at their own risk, and as a speculation. Now, although there is neither law nor equity in requiring the payment of unsecured claims until the prior liens are satisfied, bondholders might not feel outraged beyond endurance by the allowance of claims for one month's labor and supplies.

I am not here to discourage charitable feelings. And I claim that the bondholders we represent are not shown to be uncharitable. The reports of the Receiver show that under an order of the State Court, about $60,000 have been paid already on account of these labor claims, and we think that we should not be asked to contribute further. That large sum, about 20% of the six months claim for labor, has been paid already. Shall not that suffice in view of the fact that of the bondholders (over 1,100 in number) many are dependent on their investment in these bonds for the support of their declining years, while others are widows and orphans whose I. B. & W. bonds are their only inheritance. Men tottering with old age, widows and fatherless children, and foreigners who can hardly express themselves clearly in the English language, appeal to the trustee, from time to time, to learn if there is anything to hope from the Courts in their behalf, if there is any meaning or value in a first mortgage, if there will sometime be an end to the law's delay, if there will be anything left for them after other claimants are satisfied?

If compassion and sympathy for suffering are to be allowed to enter as an element in the consideration of this question, the Court should hold the scale of charity as evenly as the scales of justice are said to be held, and remember that while the laborers have received since July 1, 1874, 20 per cent. on their unsecured claims, the first mortgage bondholders have received nothing since April, 1874. But counsel may claim a charitable equity in behalf of their claims. If your Honors please, I have heard it suggested that the recording angel sometimes in pity drops a tear which blots out the record of a sin com-

mitted under strong provocation, but these gentlemen are asking too much when they appeal to this Court and ask for tears copious enough to blot out the record of these mortgages, which cover over $6,000,000 of outstanding bonds, and are secured upon a railroad running through the States of Indiana and Illinois.

It will be claimed by learned counsel on the other side that this Court is committed to a six month's rule, and that your Honors must adhere to that period as a fixed rule. But we do not understand that this Court has ever put itself squarely on the record on this question. On the contrary, the tenor of the remarks of his Honor Judge Drummond, in the case of Scott *v.* The Gilman, Clinton and Springfield R.R. Co., reported in the 6th of Bissell is opposed to this view of a fixed rule being applicable to all roads alike, regardless of their varying degrees of indebtedness, value and previous mismanagement. So also in Judge Drummond's remarks made at Chicago, in May, 1877, on the question of selling the I. B. & W. Railway as an entirety. I quote from the stenographer's report of those remarks, to show that this Court will not be held to the application of such a rule, when it appears that the mortgagor corporation had accumulated a large debt, and when its effect would be disastrous and destructive to the security of the mortgagees.

"I do not know that it is necessary to refer to the detailed facts further than what may be found to exist from the statement that has already been made, namely, that the road was operated as a unit, its property was all used as common property, and the moneys received from bonds and otherwise were received and disbursed as a common fund; but it will be observed that all these transactions took place after the mort-

gages were given upon the main line and after the disposition of the bonds, for which those mortgages were a security ; and, so far as appears, the creditors of the main line had nothing to do with the subsequent transactions of the I., B. &. W. Railway Co. Whatever was done was done by the Company of its volition and upon its own responsibility ; and the question is whether, in consequence of the action of the Company, the mortgagees on the main line have had their security in any way impaired ; whether their rights, legal or equitable, have been changed by the conduct of the Railroad Company. And I am inclined to think that their equities remain intact, and that it is not possible for the mortgagors to impair their security upon the main line. Whenever any money was obtained from any other source, no matter where or how, on the main line, when it went into the realty which constituted the security of the mortgagees of the main line, that *per se* clothed the mortgagees with whatever additional security the act thereby conferred upon them as mortgagees, and as has been frequently decided, the additional property that went into the main line was seized by the mortgagees and held for their benefit. This was stated as the rule in the opinion which was given the other day in the case, and I cannot see any reason why it should be departed from. The Company chose to take funds which had been obtained by the sale of bonds upon another portion of its road, which became, if you please, by its own action an integral part so far as it was concerned of its road ; but it did not thereby bring into a common fund or a common property that which was held as a severed property and distinct by the mortgages which were given upon the main line. *Otherwise, I repeat, as I*

stated before, it would always be in the power of mortgagors to deprive the mortgagees of their security or at any rate to so far impair it as to render it comparatively worthless."

I will read another extract from the same:

"I *am of the opinion that this cannot be done; that it is not competent for the mortgagors in this way to impose a burden upon the mortgagees of the main line contrary to their wishes and contrary to what may be considered their interests. They have a right to insist upon the equities with which their mortgages clothe them, and if it be true that the mortgagors have added by labor or by investing money or means in the property which is covered by their mortgages, it inures to the benefit of the mortgagees: in other words the mortgagees are clothed with their prior equities precisely in the same manner as though the railroad company had borrowed money from any other independent source and had appropriated it to the improvements or betterments of the main line. The mortgagees in such a case as that would have had prior equities over the parties who had furnished the money; and the rule would be the same, provided there had been a subsequent mortgage given upon the main line. All these subsequent mortgages, although the money may have gone into the main line would have been subsequent and inferior in equitable rights to the original mortgages.*"

"It is always competent for a Court of Equity, if there shall be a surplus remaining after satisfying those who hold the prior equities, to use the funds in discharging any subsequent equity; *but the right of*

the first encumbrancers must be first met and discharged before those who have inferior equities can be attended to; so that, while it may be true that a portion of the money which has been obtained from the sale of the extension bonds, has been used on the main line, and that has enhanced the security of the mortgages on that line, *still until their demands have been fully satisfied, it is not competent in my opinion for a Court of Equity to follow the money which has thus been used. The mortgages on the main line seized the property or the means that went into it from any other source and held it for the benefit of the first mortgages on the main line.*"

We accept this view of our rights, and I make your Honor's remarks, as above quoted, a part of my argument, as they express my views more clearly than could any language of my own; and I ask that the same principle shall apply to to this mass of claims for money and other means, whether of labor, supplies or car rental, which amount in the aggregate to more than $500,000.

Again I quote from the remarks of His Honor, Judge Drummond:

"*Now, you see that while I have laid down what we may consider the general rule in relation to the payment of these supplies, and labor and such claims, still I would not follow that rule where it appeared clearly,* AND I WILL NOT DO IT IN THIS CASE, *where it appeared clearly that it was going to seriously impair the value of the securities on the mortgages. In other words, I would not allow the railroad company to run so much in debt as to deprive the mortgagees of their security, absolutely and simply through the payment of supplies or mater-*

ials, or labor, to deprive them of everything, I WILL NOT DO THAT."

These being the views of the Court, I will make no further argument on the law, and I will not occupy your Honor's attention with the discussion of principles which have been so fully recognised. Citations will be handed your Honors in our printed brief, which will, we think, fully sustain the position we have taken; and in conclusion I will only refer to two cases, which will be more fully discussed by my learned associate, Judge Green, in his closing argument.

The case of Duncan *v.* The Chesapeake and Ohio Railroad Company, reported in the 3d vol. of the Central Law Journal, is one which the learned gentlemen on the other side will probably cite in favor of an allowance of claims for back pay and supplies; but an examination of that case will show that the question involved in our case was not decided. In the Virginia case there was money and property enough to satisfy all the liens, and the Court being satisfied of this, passed upon the question as to which claims should be first paid. But in the case in hearing, there is not property enough to satisfy the first mortgage, to say nothing of the second, third and subsequent encumbrances.

This Court will, however, find its position, as above stated by his Honor, Judge Drummond, fully sustained by the decision of the U. S. Supreme Court in the well-known case of Pennock *v.* Coe, and in the case of the Galveston R. R. Co., *vs.* Cowdrey, reported in the 11th of Wallace, p. 483. In this case one Pulsford supplied iron rails for the purpose of completing the road, and these rails were absolutely necessary, for unless the road could be completed, it would

be valueless. Pulsford retained a special lien upon these rails, and had this lien duly recorded for the preservation of his rights, but the Court held that his lien, although the rails saved the property and gave it an enhanced value, must be postponed until the prior mortgages were satisfied. There can be no doubt, therefore, as to what the position of the Supreme Court will be on questions of this character.

I will not further occupy the attention of the Court, but will ask my associate, Mr. Williams, to present the facts in these claims, with which I am not familiar.

IN THE

Supreme Court of the United States,

OF OCTOBER TERM, A. D. 1877. NO. 940.

FREDERICK W. HUIDEKOPER, ET AL.,
Appellants,
v.
THE HINKLEY LOCOMOTIVE WORKS,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF OF APPELLEE.

R. BIDDLE ROBERTS,
SOLICITOR.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1878.

That portion of the record which I have denominated "Additional Record," brought here by virtue of the **certiorari** *ordered by this Court on the 4th inst., not having been printed before the time at which I was compelled to file my Brief, I have had necessarily to refer to the paging of the "Original," and beg to make this apology to the Court.*

R. BIDDLE ROBERTS.

Feb. 23d, 1878.

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Statement of Case for Appellee.

It is true that the Chicago, Danville and Vincennes Railroad Company was chartered as stated in the appellants' brief, and that it did borrow money substantially as stated, and that there was a foreclosure of the mortgage. It is true that the bill was filed on the 27th day of February, 1875, in the Circuit Court of the United States for the Northern District of Illinois; but it is also true that Stephen Osgood, a bondholder, had prior to that, filed a Bill in Chancery in the Circuit Court of Will County, in the State of Illinois, and that Brown & Hammond had been appointed Receivers, and that they took possession of the Railroad on the 22d day of February, 1875, and held it by virtue of that proceeding until the appointment of General Anderson, in the Fish and Fosdick case, in the Circuit Court of the United States, who relieved Messrs. Brown and Hammond on the first of June, 1875.

That portion of the Record which has been brought here by virtue of a *certiorari* issued by this Court, will show that the Osgood case was the one in which Receivers were first appointed; that that case was removed into the Circuit Court of the United States for the Northern District of Illinois on the application of the respondents,

Additional Record, p. 124,

and that a motion was subsequently made to consolidate that case with the case of Fosdick and Fish, the trustees, which motion was refused, but the said Osgood was permitted to intervene, and did intervene, in the Fosdick and Fish case.

Printed Record, p. 73.

It will further appear, that by virtue of the removal of the cause to the Circuit Court of the United States, that Brown and Hammond, the Receivers appointed by the Circuit Court of Will County, Illinois, made their final Reports to the Circuit Court of the United States in the Osgood case, paying for supplies and other necessaries for the actual working of the Road under the direction of the Court,

Additional Record, p. 155,

and were succeeded, as has been stated, by General Anderson, the Receiver appointed by the United States Court in the Fosdick and Fish case.

The road was, therefore, in the hands of Receivers, on the application of Bondholders and Bondholders' trustees, from the 22d of February, 1875, until the time of the sale and delivery to the purchasers, April 17th, 1877. Thus, from the 22d day of February, 1875, to the 1st of June, 1875, held by Brown and Hammond, the Receivers in the Osgood case,

Additional Record, p. 164,

and from the 1st of June, 1875, to the 17th of April, 1877, held by General Anderson, the Receiver appointed in the Fosdick and Fish case.

Printed Record, p. 1.

Although General Anderson's appointment was made

on the 20th of May, 1875, he did not give bail, or actually relieve Brown and Hammond until the 1st of June, 1875.

The case of Fosdick and Fish against the road, in which the appellants in this case are intervenors, and in which case the decree of sale was had, has not been appealed from, and therefore, the main case is not in this court; and so far as this record is concerned, there is no evidence that Fosdick and Fish, the complainants in the main action, ever sought or prayed an appeal, not having joined in the Bond.

Printed Record, page 127.

And this case is brought here, it will be observed, by the vendees or purchasers at the sale, although before that, Bondholders, without even the assent of the counsel for the trustees.

It is respectfully suggested, that this is an important fact to be borne in mind in the subsequent examination of the case, because, whatever the rights of Fosdick and Fish, the trustees, may have been, it does not follow that the vendees succeeded to all of them.

In this connection the attention of the Court is invited to the very extraordinary *ex parte* affidavit of Mr. F. W. Huidekoper, filed February 26, 1877, (after the sale,) and improperly thrust into this record,

Printed Record, page 122,

in which Mr. Huidekoper undertakes to swear not only to the facts, but to the law in the case, and to say that this claim is not entitled to be paid "under any rule of decision which this Court, (Circuit Court of the United States,) had laid down," and the attention of the Court

is further called to the fact that no answer was ever filed by any one to this claim, until objection was made by these vendees.

Most all the allowances made by the Court for this and kindred claims were acquiesced in by all the parties and counsel concerned, and many of the orders, certainly this one, *originally* were entered by consent, and the motion to set aside this allowance was an after-thought, consequent upon the near conclusion of the powers of the Court.

It was not made until January 5th, 1877, as appears by the order overruling it, and in no other way,

Printed Record, page 126,

and it was in gross violation of the tacit understanding had by the Court, parties and counsel, that if this road was to be held by Receivers, and the power of the Court invoked to run it and manage it for the benefit of the, Bondholders, these claims incurred for their benefit and in their interest were to be paid, and in support of this position the attention of the Court is also called to the list of claims paid by consent,

Additional Record, pages 154 & 155

showing the acquiescence of all parties concerned to the understanding above stated.

ARGUMENT FOR APPELLEE.

I.

The cases of *McCarty* v. *Carter*, 49 Ills., 257, and *Judson* v. *Stephens*, 75 Ills., 257, cited by appellant, (p. 10,) are not analogous to this one. In those cases a party holding a leasehold interest, contracted for the erection of a building, and in the former, the Court held that the receipt of rents by owner was not a ratification of the building contract, and in the latter, that under the statute the mechanic could only claim a lien upon the interest of lessee.

The cases of

Reed v. *Bank of Tenn.*, 1 Sneed., 262,
Jessup v. *Stone*, 13 Wis., 466,
Prior v. *Munn*, 4 Cal., 175,

all hinged upon the peculiar phraseology of the statutes in those States, and can have no bearing on this case.

In the cases of

Otley v. *Howland*, 36 Miss., 19, and
Getchell v. *Allen*, 34 Iowa, 562,

the courts hold that the mechanic is entitled to a lien upon the *building* erected on mortgaged premises, though not on the land, the Iowa court making a distinction which the counsel, in citing, very carefully omitted, between a new building erected and repairs made on an old one.

Smith v. *Hughes*, 24 Ill., 270,

does not announce any such doctrine as claimed, and in the cases *Williams* v. *Chapman*, 17 Ill., 423, and *Mc-*

Logan v. *Brown*, 11 *id.*, 519, the question was not directly raised, the cases being decided, the first, on the ground that mortgagors, and the other, that judgment creditors were not made parties to the proceedings.

Dunn v. *N. Mo. R. R.*, 24 Mo., 493,
McAuley v. *W. Vt. R. R.*, 33 Vt., 323,

were decided on an entirely different state of facts from those existing in the case under consideration, and turned mainly on the construction of the statutes of those States.

II.

Appellee is entitled to a lien for the value of the use of, and repairs to the Locomotives.

On the 1st of July, 1872, the Legislature of the State of Illinois enacted the following.

"*Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That all persons who may have furnished, or who shall hereafter furnish, to any railroad corporation, now existing, or hereafter to be organized under the laws of this State, any fuel, ties, materials, supplies, or any other article or thing necessary for the construction, maintenance, operation, or repair of such roads, by contract with said corporation; or who shall have done and performed, or shall hereafter do and perform, any work or labor for such construction, maintenance, operation, or repair, by like contract, shall be entitled to be paid for the same as part of the current expenses of said road, and, in order to secure the same, shall have a lien upon all the property, real, personal, and mixed, of said railroad corporation, as against such railroad, and as against all mortgages, or other liens, which shall accrue after the commencement of the delivery of said articles, or the commencement of said work or labor: *Provided*, suit shall be commenced within six months *after such contractor or laborer shall have completed* his contract with said railroad corporation, or after such labor shall have been performed, or material furnished." (Revised Stat. of Ills., 1877, Chap. 82, p. 639.)

The Constitution of the State of Illinois, adopted by the people of that State, July 2d, 1870, and in force August 8th, 1870, provides as follows:

"The rolling stock, and all other movable property, belonging to any railroad company, or corporation, in this State, shall be considered personal property, and shall be liable to execution and sale, in the same manner as the personal property of individuals; and the General Assembly shall pass no law exempting any such property from execution and sale." (Const. State of Ill., 1870, Article 11, Sec. 10.)

The engines referred to in this appeal, were sold to the Railroad Company after the adoption of the new Constitution, and the passage of the Act of the General Assembly above quoted.

They were returned to the vendors, under order of the Court, by the Receiver, in accordance with what he believed to be the best interests of the Company, the engines not being necessary for the business of the road, and from so much of the proceeding there is no appeal by Fosdick and Fish, the trustees. Subsequently, the Court made an order, by consent, directing the payment by the Receiver to the appellee of the amount specified, $15,793.75, which was directed to be paid "for use of "and repairs to locomotives," (*vide* order page 120, printed record).

This, it will be observed, was not a payment for locomotives, nor was it a payment in any way made under, or by virtue of any existing contracts for the purchase of locomotives, but was for the "use of, and repairs" on the same, while in use on the road of the defendants, and hence in the nature of supplies.

Clearly, then, the claim was such an one as was contemplated by the Illinois Statute "giving a lien upon all "the property, real, personal or mixed," of the Railroad Company.

"The statute embraces materials used, supplies fur-
"nished, and labor performed in constructing, repair-
"ing, operating or maintaining a railroad."

Cairo & Vin. R. R. v. *Fackney*, 78 Ill., 117.

And appellant's argument (p. 18) admits a claim for rent (or use) of engines to be a claim for supplies within the meaning of the statute.

Without pausing here to discuss the question, on which appellant has laid so much stress, whether the lien provided by statute is prior to the lien of a mortgage or trust deed *properly executed, acknowledged* and recorded, we shall endeavor to show to the Court, wherein appellees are legally and equitably entitled to the decree rendered by the Circuit Court.

In the case of *Palmer* v. *Forbes*, 23 Ills., 248, cited by appellant, and so quoted as to convey the impression that he was giving continuously the portion of the opinion embodied in his argument (p. 15) the Supreme Court say:

"The road and property of the company may include its personal property, as well as the real estate, consisting of the road and its appurtenances. As there is no specification as to how personal property shall be mortgaged, the *general law regulating chattel mortgages is left to regulate the mode of executing that power.*"

The Statute of Illinois, regulating the execution, acknowledgment and recording of chattel mortgages, is as follows:

"*Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That no mortgage, or trust deed, or other conveyance of personal property, having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to, and remain with the grantee; or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded, as hereinafter directed, and every such

instrument shall, for the purposes of this act, be deemed a chattel mortgage.

"2. Such instrument may be acknowledged before a *Justice of the Peace* of the town or district where the mortgagor resides, or, if the mortgagor is not a resident of this State at the time of making the acknowledgment, then before any officer authorized by law to take acknowledgments of deeds. The certificate of acknowledgment may be in the following form: * * *

"3. If the acknowledgment is of a resident of this State, the Justice of the Peace shall enter in his docket a memorandum thereof, substantially as follows: * * *

"4. Such mortgage, trust deed, or other conveyance of personal property, acknowledged as provided in this act, shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the instrument is executed and recorded; or, in case the mortgagor is not a resident of this State, then in the county where the property is situated and kept; and shall, thereupon, if *bona fide*, be good and valid from the time it is filed for record until the maturity of the entire debt or obligation: *Provided*, such time shall not exceed two years." (Ill. Rev. Stat., 1877, Ch. 95, Secs. 1, 2, 3, and 4, p. 674.)

The Supreme Court of Illinois have frequently had occasion to construe this statute. It has repeatedly been held that to give an instrument the effect of a chattel mortgage, when the mortgaged property remains in the possession of the mortgagor, the requirements of the statute must be strictly complied with. The failure to have the instrument acknowledged before a *Justice of the Peace of the town or district where the mortgagor resides*, is a fatal defect.

Gregg v. *Sanford*, 24 Ills., 17.
Henderson v. *Morgan*, 26 Ills., 431.
Porter v. *Dement*, 35 Ills., 478.

The grantor in this case, was a *resident of the State of Illinois*, and the instrument purporting to convey chattel

interests was acknowledged *before a Notary Public of New York City.*

The trust deed relied upon by appellants was void in any event as to personal property acquired after its execution.

Subsequently acquired property is not held by a chattel mortgage, but if property comes into the possession of the mortgagor *before other liens attach*, it may create an equitable lien which a court of chancery will recognize and enforce.

Hunt v. *Bullock*, 23 Ills., 325.
Gregg v. *Sanford*, 24 Ills., 17.
Titus v. *Maher*, 25 Ills., 257.

Either the lien of the appellee for supplies must have attached before the trustees took possession, or the supplies were furnished to the receiver, and such being the case, it was clearly within the power of the Court to provide for their payment.

High on Receivers, § 392.
Cowdry v. *The Railroad Co.*, 1 Woods, 336.

The Constitution of Illinois, already cited, provides that the rolling stock and other movable property of railroad companies shall be considered personal property.

Could the mortgagees under the clause in the indenture of mortgage, conveying all property then owned or to be thereafter acquired by the Railroad Company, claim personal property acquired subsequently to the adoption of the new Constitution? We apprehend not. Of the validity of the lien upon the rolling stock and movable property owned by the Railroad Company at the adoption of the Constitution of 1870 there is grave doubt.

There can be none that as to personal property acquired after that date, the lien is invalid, the *mortgage not having been acknowledged according to the laws of the State of Illinois in force at the time of its execution.*

The possession of the Receiver was for the benefit of all parties who might at the determination of the suit be found to be entitled to the property, and prevented the lapsing of the lien of appellees by limitation.

Wrixon v. *Vize*, 3 Dr. and War., 104.

What, then, are the rights of these appellees? Clearly if there was in the possession of the Railroad Company, at the appointment of the Receiver, any personal property, they are entitled to a lien upon it to the amount of their claim. All the property of the Road, real, personal and mixed, was subject to the payment of its debts. On the real estate the appellants and the other bond holders had a first anc prior lien. On the personal property the appellees' lien had precedence over that of appellants.

A similar distinction was made in two cases, cited below, when the courts held the lien of a mortgage to be prior to that of a mechanic on the *land*, but gave precedence to the lien of the mechanic on a *building* erected on the premises subsequent to the record of the mortgage.

Otley v. *Haviland*, 36 Miss., 19.
Getchell v. *Allen*, 34 Iowa, 562.

There is enough in the record to show that large quantities of rolling stock had been purchased by the Railroad Company since the adoption of the constitution of 1870, notably, five other engines fraudulently procured from the appellees, which were not covered by the lien of the mortgage.

III.

By the terms of the trust deed, before any of the proceeds of the sale could be applied to the payment of the bonds, the trustees were required to deduct all advances and liabilities which had been made or incurred by the trustees in operating the said railroad and property, and in managing its business and affairs while in possession, and all payments for taxes, *charges* and assessments on *said premises, or any part thereof.*

Printed Record, p. 19.

Surely, under this clause of the mortgage, the Court was authorized to enter the decree it did, *in the absence of any statute prescribing a lien*, and it was done in precise accordance with the prayer of the complainants in their original bill:

"And that pending this suit a Receiver may be appointed, of all and singular of the said railroad, with all its appurtenances, franchises, rolling stock or equipment, and all the income and earnings thereof, and all other of said mortgaged premises, properties, rights, and equities, *with such orders and directions in respect to such receivership and the fruits thereof as shall be equitable and proper*, and that your orator may have such other and further relief, &c."

Additional Record, p. 157.

The Amended Bill, it will be observed, does not pray the appointment of a Receiver, simply asking that the one appointed by virtue of the prayer of the Original Bill, may still hold the road, and hence the necessity of the production of the Original Bill, omitted in appellants' record.

IV.

In the view of the case held by appellees, the second proposition of appellants has no bearing whatever on the question here involved.

Appellee does not seek the possession of the locomotives. They were delivered to appellee in September, 1875, the statement in appellants' brief, (p. 45,) to the contrary notwithstanding.

So far as we have been able to ascertain, no Court has yet decided that a contract, similar to the one in controversy, was void, or of no validity as *between the parties and their privies*. It is only as to innocent purchasers and judgment creditors that such an agreement is void.

The reason of the rule is, that the transfer of the possession of personal property without a transfer of title, might enable the holder and apparent owner to obtain credit on the strength of such possession.

The doctrine has never been carried to the extent claimed by appellant, that a mortgagee, as regards such a contract, occupies the position of a judgment creditor or innocent purchaser. As well might the mortgagee of a farm and stock, claim the horse of a neighbor at pasture on the premises.

We have yet to find a case where such a rule has been announced in a Court of Chancery. The whole tenor of equity jurisprudence is against it.

The cases in the Illinois Reports cited by appellant, in which such contracts have been construed and adjudicated upon, were all suits at law, where the rights of innocent parties had intervened, and in the case of

Hervey v. *R. I. Locomotive Co.*, 4 Otto, 664, the Locomotive Co. replevied an engine which appellant had purchased at a sheriff's sale, by virtue of an execution against the person having possession of the locomotive.

In each of these cases any other rule than that adopted by the Court would infringe the rights of innocent parties.

In this case no such facts exist. The appellees ask not the locomotives but compensation for the use of the engines, and the repairs necessitated thereby, while they were in the possession of the Railroad Company.

Can it be for a moment seriously controverted that the *equities* of the appellees are greater than those of appellants?

The order allowing the claim was entered by consent. The trustees and complainants in the original case, though nominally having prayed an appeal, it will be seen, do not sign the bond.

V.

Thus far we have discussed this case in what may be termed technically, its legal and equitable view under the decisions cited, and the form of argument presented by appellant. And while we feel we are clearly right, and entitled to the order of the Circuit Court, under the view expressed, we come now to the broader or more general view of the case, as applicable to its peculiar condition.

Much has been said in appellant's brief about what is termed "sentimental equity." We are not familiar with that kind of equity, and we feel confident that it is the

first time that any decision of the learned and able judge of the Circuit Court for the Northern District of Illinois, has been so spoken of, and that he and his friends will be somewhat surprised at the charge.

His Honor, Judge DRUMMOND, in making the allowances that he has made in this case, as well as in others of a similar sort, did take a broader view of his powers as a chancellor, than those which might be derived from any pre-supposed lien.

And in a case in which some similar questions arose, decided in May last, he has thus expressed himself, *inter alia :*

"Now these principles are applicable, I think, to contracts that have been offered in evidence in this case, and under which claims are made against the railroad. For whatever has been performed or done under these contracts which has gone to the benefit of the railroads, compensation should be given, not upon the rule of the contracts themselves, but upon the principles of justice and equity that a railroad company should not receive anything for which compensation should not be given. A Court, in taking the management and control of and operating a railroad, has to lay down some rule in relation to paying parties who have furnished materials and supplies, and who have performed work. And it will always happen whenever a Court takes control of a railroad that at that time there will be services being performed ; there will be materials and supplies being furnished and which have been recently furnished, and work which has just been done. Now it is hardly practicable or possible for a Court of Equity to say that the very moment that the Court has taken possession of the road, that all compensation for anything that has been done previously, or for any supplies that have been furnished previously shall then, at that moment, be stopped, and that for everything that is obtained in the future or done in the future, that alone shall be paid for by the Receiver. It has been found indispensable, and as an act of justice and equity to those who are dealing with railroads, that there shall be some allowance made for past services, and for materials and supplies which have been furnished in the past. Of course it is always a matter of very great difficulty, and a question of very great doubt, where you are to fix the line, when you shall say you will allow compensation to be made. As I stated during the argu-

ment, we have adopted a rule in this State which has the advantage of being a fixed and permanent rule. That is to say, a limitation which furnishes a sort of guide, so that it is not a rule to be controlled and governed by the equities and hardships of each particular case; but that while the Court will look to all the circumstances and facts in each particular case, there shall be what may be called a fixed rule established. It may be a matter of doubt, perhaps, whether the Court has not gone too far under the decision of the Supreme Court of the United States in allowing these claims, gone too far back, that is to say; however, I do not feel inclined to depart from the practice which has been established. It does allow the employees or persons who have done work, persons who have furnished supplies and materials, a compensation for all that has been done, and all the suppiles that have been furnished within a reasonable time; and of course there must be a limit to this. It is impossible for the Court, in view of the just protection which should be given to those who have claims upon the road to go back an indefinite time; and if the road has allowed large accumulations of indebtedness to exist against it, to pay all that indebtedness, whatever it may be, and how far-soever back it might go."

Turner v. *Ind., Bloom. & W. Ry. Co., et al.*

This is perhaps as satisfactory a statement of the rules governing the Circuit Court of this district for years back, as any that can be obtained, and quite as reliable as the affidavit of Mr. Huidekoper.

From the inception of this case, down to the sale, the powers of a court of chancery were invoked by and used for the exclusive benefit of these bondholders, asking for that species of decree which a court of chancery alone could give them, declaring the whole amount of the mortgage due, simply upon a default of interest, which certainly could not be conscientiously exercised without a careful guardianship of the interests of all involved in the result of such a decree.

The appointment of a Receiver in equity is the exercise of an extraordinary power, and that aid and the exercise of that power, and the immense stretch of a chancellor

were invoked by those very people who now find fault with the smaller decrees. The Receivers were appointed that their rights might be concentrated, their property protected, and the interests they had in this line of railway be preserved from the time the Receivers went into possession until the property was turned over to the purchasers.

For the benefit of these appellants, all this property, which, had it been permitted to remain idle, would have deteriorated until it became almost valueless, was preserved, maintained, operated, and its value actually increased, under the direction of the court and its Receivers. For their advantage, these outlays for supplies were made. Appellees' locomotives drew their trains, and brought in their freight charges and passenger fares. Without them their road was useless and valueless, and destitute of revenue. Can it now be said, in a court of equity, that the very beneficiaries, from the protection given, are to defraud still further these unfortunate manufacturers? *Certainly it is not just, and therefore cannot be equitable.*

R. BIDDLE ROBERTS.

CHICAGO, FEBRUARY, 1878.

IN THE

United States Supreme Court.

OCTOBER TERM, A. D. 1878.

WILLIAM R. FOSDICK, ET AL.,
Appellants,
vs.
THE SOUTH WESTERN CAR COMPANY,
Appellee.
AND
FREDERICK W. HUIDEKOPER, ET AL.,
Appellants,
vs.
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Appellee.

Appeals from the Circuit Court of the U. S. for the Northern District of Illinois.

Numbers 630 and 573.
Present Term Docket.

Argument in Behalf of Appellees.

By JOHN M. BUTLER,
SOLICITOR.

INDIANAPOLIS:
Baker & Randolph, Printers, Binders and Blank Book Manufacturers.
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Not being of counsel in the above entitled causes, no attempt will be made to brief them upon their particular facts and records.

Under the permission granted by the Court, and by courtesy of R. Biddle Roberts, Esq., Solicitor for Appel-

lees, this argument is submitted as applicable to the main questions involved in these Appeals.

I.

The possession of a railway and the equipment in use upon it, taken by a receiver under appointment of a court, changes no right of ownership of any part of the property taken into possession by the receiver: It perfects no title to any part of the property taken into possession: It gives no new or added right or title to any part of the property taken into possession: It changes no contract regarding the ownership of any part of the property taken into possession; but is solely and only a holding by the same title, and subject to the same contracts, limitations and conditions of title that the railway company held the property by, and subject to, at the time of the appointment of the receiver.

"The appointment of a receiver determines no right, "and in no way affects the title of the property; his "holding is the holding of the court for him from whom "the possession is taken."

Edwards on Receivers, 2d ed., p. 12.

"A receiver of a corporation is not regarded as a "purchaser for a valuable consideration, but as its vol- "untary assignee and personal representative."

Edwards on Receivers, 2d ed., p. 4.

"He is appointed for the benefit of all parties who "may establish rights in the cause; and the money (or "property) in his hands is in *custodia legis* for whoever "can make out a title to it."

Edwards on Receivers, 2d ed., p. 3.

"The receiver of an insolvent corporation can not "impeach or disaffirm the lawful and authorized acts of "the corporation."

Edwards on Receivers, 2d ed., p. 165.

"A receiver appointed by the court is appointed on "behalf of all parties, and not of the plaintiff, or "of one defendant only. * * * The effect of the "appointment, however, is not to oust any party of his "right to the possession of the property, but merely "to retain it for the benefit of the party who may ulti- "mately appear to be entitled to it."

Daniells' Chancery, vol. 2, chap. 28, sec. 3.

"A receiver is vested by law with the powers of the "corporators and the estate of the corporation; *and for* "*the purpose of determining the extent of his power and title,* "*he represents the body itself.* * * * His appointment "does not change the rights of action, *or the contract* "*relations of the corporation.*"

Field on Corporations, sec. 419, 420.

"A receiver being appointed for the preservation of "the fund or property *pendente lite*, and for its ultimate "disposal according to the rights and priorities of the "parties entitled, the remedy is regarded in the nature of "a sequestration rather than an attachment of the pro- "perty, and it ordinarily gives no advantage or priority "to the person at whose instance the appointment is "made, over other parties in interest. *Nor does it change* "*the title or create any lien upon the property*, its purpose "in this respect being rather like that of an injunction "*pendente lite*, to preserve the subject matter until the "rights of all parties can be judicially determined."

High on Receivers, sec. 5.

"The appointment of a receiver over a corporation "does not have the effect of changing any rights of ac- "tion, or of changing the contract relations existing "between the corporation and its debtors. * * * * "Since the receiver of a corporation, as we have already "seen, succeeds to the estate of, and derives his title from, "the corporation, he is bound by all its lawful and au- "thorized acts done before the receivership, and will not "be allowed to disaffirm, or set them aside. As to all "such matters he stands in precisely the same position "as the corporation itself stood before his appointment."

High on Receivers, sec. 318, 319.

"The recovery in this case seems to have gone upon "the ground that the receiver had greater rights than "those which belonged to the company. But for most "if not for all purposes, he took the place, and stands "as the representative, of the company. He is as much "bound by a settlement which the company was author- "ized to make, as was the company itself. It would be "strange, indeed, if the legal acts of a corporation did "not bind the receiver of its effects. If the rule were "not so, no one would dare to venture to deal with a "corporation."

BRONSON, J.

Hide vs. Lynde, 4 Comstock 392.

"It has been said in this, as in other cases, that he "(the receiver) represents the creditors and stockhold- "ers, but for all the purposes of inquiry into his title, he "really represents the corporation. He is by law vested "with the estate of the corporate body, and takes his "title under and through it. * * * In general, then, "a receiver of this description takes merely the rights "of the corporation, such as could be asserted in its "own name."

COMSTOCK, J.

Curtis vs. *Leavitt*, 15 N. Y., 44.

"A decree for a receiver is a discretionary power "exercised by this court with as great utility to the sub- "ject as any sort of authority that belongs to it, and is "provisional only for the more speedy getting in of a "party's estate and securing it for the benefit of such "person who shall appear to be entitled, *and does not at "all affect the right.*"

Skip v. *Harwood*, 3 Atk., 565.

"The court never affects any right by the appoint- "ment of a receiver. Practically it may affect the *inter- "est* of the parties—it never affects their *right*—by the "appointment of a receiver. The receiver is the officer "of the court, who holds the property for whosoever "may ultimately appear to be entitled, and without that "title being in any way prejudiced in theory or princi- "ple by the appointment of a receiver."

Portman v. *Mill*, 8 Law Journal (New Series), p. 165.

"A receiver in a cause is not appointed for the "benefit of a plaintiff merely, but for all other persons "who may establish rights in the cause. A receiver "can not be more the agent of the plaintiff than a "sequestrator. * * * Rents received by sequestra- "tors are not considered as vested in the plaintiff, but "are in *custodia legis*."

Delany v. *Mansfield*, 1 Hogan, 235.

"The assignment to the receivers passes the rights "and property of the corporation precisely in the same "plight and condition, and subject to the same equities "as the corporation held them. The receivers are not "assignees for a valuable consideration, in the ordinary "sense of that term, but are regarded as the voluntary "assignees and personal representatives of the corpora- "tion.

Receivers v. *The Paterson Gas Light Company*, 3 Zabr. N. J., 292.

"A Receiver is but an officer of the court: his ap- "pointment determines no right, and in no way affects "the title of the property."

In re Colvin, 3 Md. Ch. Decis., 280.

"A receiver is an officer of the court. He is consid- "ered as truly and properly the hand of the court; but "his appointment determines no right, nor does it affect "the title to the property in any way.* * * * The "holding of the receiver, is the holding of the court for "him from whom the possession was taken."

Williamson vs. *Wilson*, 1 Bland, 421.

"The appointment of a receiver does not involve the "determination of any right; or affect the title of either "party in any manner whatever."

H. K. Chase's case, 1 Bland, 213.

"The appointment of a receiver does not determine "any right, or affect the title of either party, in any man- "ner whatever. * * * His appointment is not to

"oust any party of his right to the possession of the "property, etc."

Ellicott vs. *Warford*, 4 Maryland Rep., 85.

"The decree, appointing receivers, gave no priority "or superiority of right to the parties upon whose ap- "plication, or in whose behalf it was made. Story Eq. "§ 829. Adams Eq. 355. *It had no effect to change the "title, or create any lien upon the property.*"

WELLS, J.

Ellis vs. *Boston and Hartford Railroad Company*, 107 Mass., 28.

"They (the receivers) represent the bank for the "purpose of closing its concerns, and for no other. They "parted with nothing when they entered upon the dis- "charge of their duties, and they have no rights superior "to those which the bank would have had, if the man- "agement of its affairs had continued with its direc- "tors."

Lincoln vs. *Fitch*, 42 Maine, 469.

"The plaintiff, as receiver of 'The American Mu- "'tual Insurance Company,' takes its notes and assets "subject to all the conditions and legal disabilities with "which they were trammeled in the hands of the corpo- "ration. * * * The receiver stands precisely in the "shoes of the corporation."

Devendorf vs. *Beardsley*, 23 Barb., 659.

"The appointment of a receiver could not operate "to change the nature or terms of these agreements. "Courts have no power, any more than legislatures, to "change and impair the essential obligations of a valid "contract, and to convert a limited and conditional obli- "gation into an unconditional one."

Williams vs. *Babcock*, 25 Barb., 120.

These authorities clearly establish the proposition that a receiver of a corporation *takes no better title than the corporation possessed the instant of his appointment.* The appointment of, and possession taken by, a receiver *enlarge*

no right of ownership, *perfect* no title, *create* no title, *change* no contract regarding title.

The receiver, as the present representative of the court, takes possession of the property, rights and franchises in possession of the corporation, and holds them precisely as the corporation held them, and subject to all conditions and limitations that were binding upon the corporation. In cases in which the appointment of a receiver does not work a forfeiture of the corporate charter—as in railway receiverships—the receiver does not take actual title to the property at all; he only takes possession, and the right of possession; the *title*, remains in the corporation, *unchanged*, *unenlarged*, *undiminished*; the foreclosure proceeds against the corporation, and the title acquired by sale on foreclosure decree is derived from the corporation, not from the receiver. It is, therefore, impossible for the appointment of a receiver to *change*, *enlarge*, *perfect* or *create* title to, or the right of possession of, any of the property in the possession of the corporation at the time of the appointment. The claim that the appointment of a receiver is equivalent to an entry by the mortgagees, even if conceded—we do not think the authorities support the statement, but do not care to discuss the question—does not militate against, or in any degree weaken the proposition as stated, because the entry and possession of a mortgagee, under his mortgage, does not change, or in any degree strengthen the mortgagor's title. Such entry and possession does not give the mortgagee title to, or the right of possession of, *property not owned by the mortgagor*, and, therefore, not covered by the mortgage.

"The right of plaintiffs (mortgagees) can not extend "beyond the property mortgaged: and the right of the "receiver must necessarily have the same limitation."

Noyes vs. *Rich*, 52 Maine, 117.

"Proceedings for the appointment of receivers in "actions for the foreclosure of railway mortgages, are "regarded as *in rem*, to the extent that they seek to "reach such property of the corporation as was mort-"gaged to secure the bondholders. And the right of "the receiver to the possession of the corporate prop-"erty, being subjected to the same limitations governing "the rights of the mortgage bondholders in whose "behalf he was appointed, *extends only to the specific prop-"erty which is the subject of the litigation and covered by the "mortgage.*

High on Receivers, sections 378, 394.

If, therefore, a railway company, at the time a receiver is appointed, has in its possession and use rolling stock—coaches, cars or engines—*not owned by the company*, the receiver acquires no higher or better right to the possession of such rolling stock than the company had; he takes possession of such rolling stock by virtue of the possession the company had of it; *his right of possession is subject to the same conditions and limitations that were obligatory upon the company.* If the company had not acquired title to the rolling stock, the possession taken by the receiver could not *create* title to it. If it was not *owned* by the company, neither the receiver nor the mortagees can claim any title to it by virtue of the receiver's appointment. A railway mortgage, by its terms, reaching future acquired property of the company, does not cover property *never acquired* by the company.

II.

A contract of conditional sale of rolling stock to a railway company,—by the terms of which the railway company, conditional vendee, takes possession, but the conditional vendor retains the title and ownership of the rolling stock until full payment for it is made—is a legal and valid contract, binding upon the railway company and its receiver. Under such a contract, as between the company and its privies and the conditional vendor, the title to the rolling stock does not pass to, or vest in, the railway company until full payment is made.

"Where the right to receive payment before deliv-
"ery is waived by the seller and immediate possession
"given to the purchaser, and yet by express agreement
"the title is to remain in the seller until the payment of
"the price upon a fixed day, such payment is strictly a
"condition precedent, and until *performance* the right of
"property is not vested in the purchaser."

1 *Parsons on Contracts*, *449.

"Where the buyer is by the contract bound to do
"anything, either precedent or concurrent, on which
"the passing of property depends, the property will not
"pass until the condition be fulfilled, even though the
"goods may have been actually delivered into the pos-
"session of the buyer."

Benjamin on Sales, 1 Am. ed., sec. 320.

"A sale and delivery of goods, on condition that the
"property is not to vest until the purchase money is
"paid or secured, do not pass the title to the vendee until
"the condition is performed; and the vendor, in case
"the condition is not fulfilled, has a right to repossess
"himself of the goods, both against the vendee, and
"against his creditors; and also, if guilty of no laches,
"the vendor may reclaim the goods so sold and deliv-
"ered, even from one who has purchased them from
"his vendee in good faith, and without notice."

Story on Sales, sec. 313.

"As has been already stated, mere *delivery* of prop-"erty, under a conditional contract for future sale, does "not change it from an executory into an executed "agreement, and thus vest an immediate title in the "proposed buyer."

Hilliard on Sales, p. 61.

"Where there is a condition precedent attached to a "contract of sale and delivery, the property does not "vest in the vendee on delivery, until he performs the "condition, or the seller waives it; and the right contin-"ues in the vendor, even against the creditors of the "vendee."

2 *Kent's Com.*, *497.

"It is well settled, that where goods are sold and "delivered on condition that the property therein "shall not vest in the buyer until the purchase money "is paid or secured, such payment or adjustment "of the purchase money is a condition precedent, on the "buyer's part, to the transfer of title to himself from the "seller."

2 *Schouler's Personal Property*, p. 292.

It will be observed that these standard authorities go far beyond a full support of the proposition stated. Even the decisions of the Supreme Court of the State of Illinois—upon which counsel for appellant seem mainly to rely—fully sustain our proposition.

"It was a conditional sale, with a right of recision "on the part of the vendor, in case the purchaser should "fail in payment of his installments,—*a contract legal "and valid as between the parties*, but made with the risk "on the part of the vendor of losing his lien, in case "the property should be levied upon by creditors of the "purchaser while in possession of the latter."

March v. *Wright*, 46 Ill., 488.

Gibbs v. *Jones*, 46 Ill., 319.

Fawcett, Isham & Co. vs. *Osborn, Adams & Co.*, 32 Ill., 411.

"This was a case of fraudulent sale, of possession "obtained fraudulently, in a case where the vendor "intended to have the title pass with the possession. "*It was not a conditional sale where possession is given, but "title is not intended to pass with possession.* It is insisted, "that as between plaintiff and Jennings, the law is, that "as between them, both parties being innocent, the loss "should fall on the owners who, by intrusting Van "Valin with the possession, enabled him to commit a "fraud. This is unquestionably the law where the own- "ers, with the intention of sale, have voluntarily parted "with possession. *But this principle does not apply to sales "on condition, and where the original owners had never con- "sented to the transfer of the property.*"

Jennings vs. *Sage*, 13 Ill. 613.

In the case of *Hervey et al.* vs. *R. I. Locomotive Works*, 3 Otto, 672, Mr. Justice Davis explains the wide difference between the rulings of the Illinois Court and the Courts of almost every other State in the Union, in the following language:

"The policy of the law in Illinois will not permit the "owner of personal property to sell it, either absolutely "or conditionally, and still continue in possession of it. "Possession is one of the strongest evidences of title to "this class of property, and can not be rightfully sepa- "rated from the title, except in the manner pointed out "by statute. The Courts of Illinois say that to suffer, "without notice to the world, the real ownership to be "in one person, and the ostensible ownership in another, "gives a false credit to the latter, and in this way works "an injury to *third persons*. Accordingly, the actual "owner of personal property creating an interest in "another to whom it is delivered, if desirous of preserv- "ing a lien on it, must comply with the provisions of "the Chattel Mortgage Act. * * * If this be not "done, the instrument, *so far as third persons are con- "cerned*, has no validity."

This seems a strange and incongruous mixing of

things wholly unlike, and is certainly in direct conflict with the vast weight of authority on this question.

How a man can be required to take, and record, a chattel mortgage to preserve a *lien* upon personal property, *when he has never parted with the title to that personal property*, is beyond easy comprehension. The language of the Chattel Mortgage Act, upon which this theory of the Illinois Courts is based is as follows:

"That no mortgage, trust deed or other conveyance "of personal property having the effect of a mortgage "or lien upon such property, shall be valid as against "the rights and interests of any third person, unless "possession thereof shall be delivered to and remain "with the grantee, or the instrument shall provide for "the possession of the property to remain with the "grantor, and the instrument is acknowledged and re-"corded as hereinafter directed; and every such instru-"ment shall, for the purposes of this act, be deemed a "chattel mortgage."

Rev. Stat. of Ill., 1874, p. 711.

How can a contract of conditional sale, as interpreted and explained by the authorities already quoted, be made subject to this law? A contract of conditional sale is *not* a "*mortgage*," it is *not* a "*trust deed*," it is *not* a "*conveyance of personal property having the effect of a mortgage or lien upon such property.*" It can not be a "mortgage" because the *whole title* remains in the vendor. It can not be a "trust deed," because if it were the vendor would have *passed the title* from him. It can not be a "conveyance of personal property," because the conditional vendor has *never parted with his title.*

If A. should lend or hire his reaper and plow to B. for a season's farming, the possession of B. would be just as likely to give a "false credit" to B. as it would if

he had possession of the articles under a conditional contract of sale, and yet the Illinois courts would hardly hold that an agreement to lend or hire personal property comes within their chattel mortgage act. But it is not necessary to discuss this question further. Whether the Illinois decisions are, or are not, well founded in reason upon this point, it is sufficient to know that they fully support the proposition under consideration, viz.: *That a contract of conditional sale is valid and binding as between parties*, regardless of the Illinois Chattel Mortgage Act.

It has already been shown that the receiver stands in the place of the company, and is as much bound by such a contract as is the company. Even if the mortgagees had entered and taken possession from the company without the appointment of a receiver, they would bear precisely the same relation to such contracts of conditional sale that the company sustained. The contracts would be as valid and binding upon them as upon the company, even under the theory of the Illinois decisions, because the only ground upon which these decisions hold such contracts invalid as to *third parties*, is that the *possession* of the property by the conditional vendee tends to cause *third persons* to give the conditional vendee *false credit, based upon his possession*. Mortgagees who gave all the credit they have ever given to the company *long before* the company acquired *any* personal property, and whose only shadow of claim to the property under consideration is based upon the clause in their mortgage covering *future acquired* property of the company, can hardly claim that they have been defrauded into giving

"false credit" to the company because of the *possession* by the company of rolling stock, under a conditional contract of sale, or because the conditional vendor did not record his conditional contract of sale as a chattel mortgage. As to the company, as to its receiver who stands in its shoes, and as to mortagees who have given the company no credit by reason of its possession of rolling stock not owned by it, contracts of conditional sale are valid and binding, even under the Illinois decisions.

In the case of *Hervey* v. *R. I. Locomotive Works*, 3 Otto 673, the decision is based upon the case of Murch *vs.* Wright, 46 Ill., 488, above cited, and fully sustains our proposition as stated. Mr. Justice Davis, in rendering the opinion, adopts the language of Murch *vs.* Wright, *supra*, holding the conditional contract valid between parties as follows: "The court held 'That it "was a mere subterfuge to call this transaction a lease,' "and that it was a conditional sale with the right of "recision upon the part of the vendor, in case the pur- "chaser should fail in the payment of his installments— "*a contract legal and valid as between the parties*—but sub- "jecting the vendor to lose his lien in case the property "while in possession of the purchaser, should be levied "upon by his creditors. That case and the one at bar "are alike in all essential particulars."

The proposition under discussion only claims validity and binding obligation of contracts of conditional sale, *as between parties and privies*, because that is sufficient for the purposes of the case at bar. The text writers already cited would support a much broader prop-

osition, viz.: *That under contracts of conditional sale the conditional vendor holds his title absolute, not only against the conditional vendee, but also against attachments and executions levied upon the property while in possession of the conditional vendee, in favor of creditors, and even against innocent bona fide purchasers, without notice.* Or, to use the language of a prominent text writer: "We may "state, as decidedly the better opinion in this country, "that a sale of personal property made by one to whom "the chattel was delivered by the original seller, on con- "dition that property should not pass until the chattel "was paid for, or the price duly adjusted, confers no "better title upon a *bona fide* purchaser without notice "from the original buyer, than the buyer himself had, "or his attaching creditors, or a purchaser with actual "notice of the condition: *that against all of these* the origi- "nal seller may with due diligence follow up his rights, "and reclaim the chattel as his own for non-fulfillment "of the condition annexed to the delivery."

2 *Schouler's Personal Property, p.* 299.

To establish beyond controversy that the great weight of authority is in favor of this broader proposition, and fully confirms its correctness, we cite, without comment, the following cases:

Copland v. *Bosquet*, 4 Wash. U. S. C. C. R's, 588.

Rogers' Locomotive Works v. *Lewis*, 4 Dillon's U. S. C. C. R's, 158.

In Maine. *Tibbetts* v. *Towle*, 12 Me., 341; *Hotchkiss* v. *Hunt*, 49 Me., 213; *Edwards* v. *Grand Trunk R. R. Co.*, 54 Me., 105; *Crocker* v. *Gullifer*, 44 Me., 492.

In New Hampshire. *Luey* v. *Bundy*, 9 N. H., 298;

Porter v. *Pettengill*, 12 N. H., 300; *Kimball* v. *Jackman*, 42 *Arnold*, 16 Vt., 382; *Manwell* v. *Briggs*, 17 Vt., 716; N. H., 242; *McFarland* v. *Farmer*, 42 N. H., 386.

In Vermont. *West* v. *Bolton*, 4 Vt., 558; *Bradley* v. *Root* v. *Lord*, 23 Vt., 568; *Davis* v. *Bradley*, 34 Vt., 55; *Clark* v. *Wells*, 45 Vt., 4; *Armington* v. *Houston*, 38 Vt., 448.

In Massachusetts. *Coggill* v. *Hartford and New Haven Railroad Company*, 3 Gray, 545; *Sargent* v. *Metcalf*, 5 Gray, 306; *Burbank* v. *Crooker*, 7 Gray, 158; *Deshon* v. *Bigelow*, 8 Gray, 159: *Hirschorn* v. *Canney*, 98 Mass., 149; *Day* v. *Bassett*, 102 Mass., 445; *Crompton* v. *Pratt*, 105 Mass., 255; *Barrett* v. *Pritchard*, 2 Pick., 512; *Hussey* v. *Thornton*, 4 Mass., 405; *Marston* v. *Baldwin*, 17 Mass., 606.

In New York. *Ballard* vs. *Sampson*, 40 N. Y., 314; *Keeler & Freeman* vs. *Field*, 1 Paige, 312; *Herring* vs. *Hoppock*, 15 N. Y., 409.

In Connecticut. *Forbes* vs. *Marsh*, 15 Conn., 384; *Hart* vs. *Carpenter*, 24 Conn., 427.

In Pennsylvania. *Rose* vs. *Story*, 1 Penn. State, 190; *Agnew* vs. *Johnson*, 22 Penn. State, 471; *Lehigh Company* vs. *Field*, 8 Watts & Sargents. Penn. 232.

In Ohio. *Sage* vs. *Sleutz*, 23 Ohio State, 1; *Roland* vs. *Gundy*, 5 Ohio Reports, 202; *Carmack* vs. *Gordon*, 2 Sup. C. R, 410.

In Indiana. *Thomas* vs. *Winters*, 12 Ind., 322; *Shireman* vs. *Jackson*, 14 Ind., 459; *Plummer* vs. *Shirley*, 16 Ind., 380; *Hanway* vs. *Wallace*, 18 Ind., 377; *Dunbar* vs. *Rawles*, 28 Ind., 225; *Bradshaw* vs. *Warner, et al.*, 54 Ind., 58.

In Missouri. *Parmlee* vs. *Catherwood*, 36 Missouri, 479; *Griffin* vs. *Pugh*, 44 Missouri, 326; *Little* vs. *Page*, 44 Missouri, 412; *Ridgeway et al.* vs. *Kennedy et al.*, 52 Missouri, 24.

In Iowa. *Bailey* vs. *Harris*, 8 Iowa, 331; *Robinson* vs. *Chapline*, 9 Iowa, 91; *Baker* vs. *Hail*, 15 Iowa, 277.

In Kansas. *Owens* vs. *Hastings & Sexton*, 18 Kansas,

446; *Sumner* vs. *McFarland*, 15 Kansas, 600; *Hallowell* vs. *Milne*, 16 Kansas, 65.

In Michigan. *Couse* vs. *Patrick*, 11 Mich., 65; *Fifield* vs. *Elmer*, 25 Mich., 48.

In Wisconsin. *Hunter* vs. *Warner*, 1 Wis., 126; *Goldsmith* vs. *Bryant*, 26 Wis., 34.

In Tennessee. *Price* vs. *Jones*, 1 Head, 84; *Bradshaw* vs. *Thomas*, 7 Yerger, 497; *Gambling* vs. *Read*, 1 Meigs, 281; *Buson* vs. *Dougherty*, 11 Humph., 50.

In North Carolina. *Ellison* vs. *Jones*, 4 Ired., 48; *Parris* vs. *Roberts*, 12 Ired., 268.

In Kentucky. *Patton* vs. *McCane*, 15 B. Monroe, 555; *Chism* vs. *Woods*, Hardin's Rep.'s, 532.

In Georgia. *Goodwin* vs. *May*, 23 Georgia, 205; *McBride* vs. *Whitehead*, 1 Georgia Decis., 165.

In Alabama. *Thompson* vs. *Ray*, 46 Ala., 224.

In Mississippi. *Mount* vs. *Harris*, 1 S. & M., 185.

In Delaware. *Williams* vs. *Connoway*, 3 Houston's Del. Rep.'s, 63.

The two propositions thus far considered, and the authorities cited in support of them, seem clearly and definitely to establish,

1. That a receiver takes no better title than the company; that the appointment of a receiver neither perfects nor creates title; that it in no manner affects or changes title to any property taken into possession, and that the holding and possession of the receiver are the holding and possession of the Court, subject to all contracts, limitations and conditions regarding title that were binding upon the company at the time of the appointment.

2. That a contract of conditional sale of rolling stock—the vendor to retain title until paid for—is a legal and valid contract, binding upon the company and

its receiver; that under such contracts, no title passes until the condition is complied with, and that, as between the company, its receiver and mortgagees, and the conditional vendor, such contracts are valid and binding, even under the decisions of the Courts of Illinois, without recording the conditional contract of sales as a chattel mortgage.

It has further been shown that the authorities, by an overwhelming preponderance, establish the stronger proposition, that contracts of conditional sale—the title to remain in the vendor until full payment is made—are valid and binding against everybody, and that under such contracts, the conditional vendor holds his title absolute against, not only the vendee and his privies, but also against attaching creditors of the vendee, sales on execution levied by creditors of vendee, and even against *bona fide* innocent purchasers without notice.

If these propositions are satisfactorily established, it follows that

III.

If a receiver is appointed and takes possession of a railway while the company has in its possession rolling stock conditionally purchased—the vendor to retain title until payment is made—and not paid for, the receiver takes no higher or better title to such rolling stock than the company held at the instant of his appointment. The company had no title. The appointment of a receiver did not CREATE *title and vest it in him. The company not having acquired the title to such rolling stock, it never became subject to the lien of the mortgage executed by the company, and can not be held by the receiver*

or by the mortagees, except upon the terms of complying with the conditions of the contract of conditional sale. If a receiver uses such rolling stock in the operation of the railway and does not comply with the contract of conditional sale by paying for it, the trust is liable to the owner for the use of the property by the receiver, to be paid for out of the earnings of the trust property while in the hands of the receiver, or out of the proceeds of sale of the trust property, if the earnings have been applied to the benefit of the trust property.

This proposition has been so completely decided by this court, that it will not be necessary to multiply authorities in its support.

The case of *United States* vs. *New Orleans Railroad*, 12 Wallace. 362, was a suit involving the precise question under consideration. It was, in effect, a conditional sale of rolling stock, by the government to the company. At all events the government retained a lien on the rolling stock until full payment was made, and the company agreed not to sell it, or part with it, until payment of the price, without consent of the government. The company had previously executed a mortgage covering *future acquired property*. While the company held possession of the rolling stock so purchased from the government, the previous mortgage was foreclosed, and the mortgagees—just as in the case at bar—claimed the rolling stock under the clause of their mortgage covering future acquired property.

Mr. Justice Bradley, in delivering the opinion of the Court, uses the following language:

"This, we apprehend, is an erroneous view of the "doctrine by which after-acquired property is made to

"serve the uses of a mortgage. That doctrine is "intended to subserve the purposes of justice, and not "injustice. Such an application of it as is sought by "appellants, would often result in gross injustice. A "mortgage intended to cover after-acquired property, "can only attach itself to such property *in the condition "in which it comes into the mortgagor's hands.* If that "property is already subject to mortgages or other liens, "the general mortgage does not displace them, though "they may be junior to it in point of time. It only "attaches to such interest as the mortgagor acquires. * * "Had the property sold by the government to the railroad "been rails, as in the case of the *Galveston Railroad Co.* v. "*Cowdrey*, or any other material which became affixed "to, and a part of, the principal thing, the result would "have been different. But being loose property, sus- "ceptible of separate ownership and separate liens, such "liens, if binding on the railroad company itself, are "unaffected by a prior general mortgage given by the "company, and paramount thereto. In the case "before us, the United States, at the time of making the "sale, reserved a lien on the property, and imposed a "condition of non-alienation until the price should be "paid. Taken altogether the transaction amounts to a "transfer *sub modo*, and the lien must be regarded as "attaching to the property itself, and as paramount to "any other liens arising from the prior act of the com- "pany."

In the case of *State of Florida* v. *Anderson et al.*, 1 Otto., 690, the validity of a contract of conditional sale of locomotives was recognized. The contract was held binding upon both the company and its receiver, and the receiver was directed to comply with the condition of the contract by full payment.

In *Williamson* v. *New Jersey Southern Railway Company*, 28 New Jersey Equity Reports, 277, the court held that "A mortgage of after-acquired property can only "attach itself to such property in the condition in which

"it comes to the mortgagor's hands. If it is already "subject to mortgages or other liens, the general mort- "gage does not displace them, though they may be "junior in point of time. It only attaches to such "interest as the mortgagor acquires."

Any different interpretation of the law would make it unjust and inequitable. It is clear, then, that if a receiver, on taking possession of a railway, comes into possession of rolling stock held by the company under contract of conditional sale—the vendor to retain title until payment is made—and not paid for, *the receiver can not hold the property unless he complies with the contract under which the company obtained possession of it.* It is equally clear that the mortgagees can not hold it under the "after-acquired property" clause of their mortgage. If the receiver *uses* rolling stock so held under contract of conditional sale in the necessary operation of the railway and does not acquire the title to it by paying for it according to the contract, is it not equally clear that *the trust* is liable to the owner for the use and necessary repair of the rolling stock while used by the receiver? Neither law, equity nor morality would sanction a negative answer. Out of what fund shall the owner be paid for the use of his property by the receiver? FIRST, all the *earnings* of the trust property while in the hands of the court belong to the court until all the obligations of the court incurred in administering and caring for the trust property are fully paid.

Ellis v. *B., H. and E. R. R.*, 107 Mass., pp. 29–30.

The earnings of the railway, while in the hands of

the receiver should be applied first to liquidate all operating expenses; the use of rolling stock is necessary in the operation of the railway; if the receiver uses more rolling stock than the company owned, the fair rental and repair of the rolling stock not owned, are operating expenses, and should be paid out of the earnings. This is the fund primarily liable for such payments. But it often, in fact usually, happens that when railways pass into the hands of receivers, they are in a dilapidated condition—often a dangerous condition—requiring large, and immediate, expenditures in order to preserve the property and its franchise rights. If the court should expend the earnings in paying current operating expenses, necessary repairs and betterments to the property could not be made; it, therefore, very usually happens that current operating expenses run in arrears, and remain unpaid, because the earnings are expended in repairs and betterments to the property. If, while the receiver's operating expenses remain unpaid, because the money that should have paid them has been expended in repairing and bettering the trust property, the foreclosure is perfected and sale takes place, can it be possible that the debts contracted by the court, are not to be paid at all? The enormity of such a proposition makes its refutation unnecessary. Therefore,

SECOND. If the earnings of the railway, in the hands of the receiver, have been expended in repairs and betterments to the property, leaving receiver's operating expenses unpaid, all receiver's debts so remaining unpaid must be paid out of the proceeds of sale of the property. The *property* owes the debts—not the court or receiver—

and must pay them. It is difficult to listen with respect, or even patience, to the claim of mortgagees and bondholders, who come before the court, saying:

"It is true the company never paid for or owned this rolling stock. It is true the company only had possession of it under a contract of conditional sale, by the terms of which the vendor retained the title until payment should be made. It is true the receiver has used it for the benefit of our property, and earned money with it which has been expended in repairing and adding value to our property. Yet we claim the absolute ownership of this rolling stock, under the 'after-acquired property' clause of our mortgage. And if the Court refuses to sanction our claim and requires the property to be paid for, or surrendered to the lawful owner, we further claim, that no payment for the property, or for its rental and repair, while in use by the receiver, can be made out of the proceeds of sale."

Counsel for appellants may style it "sentimental equity," when Courts refuse to sanction such unjust claims of bondholders, and require rolling stock so held to be paid for, or surrendered, and if surrendered, that its rental and repairs shall be paid for, but we shall be much mistaken if it does not prove to be equity supported by law and approved by the best sentiments of all honest minds.

It has been our purpose in this brief to establish:

1. That a receiver takes no better or different title to rolling stock in possession of a company, than the company had.

2. That the possession taken by a receiver gives no

new or added right to the mortgagees regarding the title by which the company held its rolling stock.

3. That a contract of conditional sale, by the terms of which the vendor retains title until the property is paid for, is a valid contract, binding upon the company, the receiver and the mortgagees.

4. That under such a contract no title passes from the vendor until the condition of the contract is performed. That rolling stock coming into possession of a receiver under such a contract can not be held by the receiver, or by the mortgagees under foreclosure sale, unless the contract is complied with by payment.

5. That the receiver must surrender rolling stock so held to the vendor, or pay for it, and if he surrenders it he must pay for its use and needed repairs while used by him, and that this payment should be made out of the earnings of the railway in the hands of the receiver, as a primary fund for such payments; but, if the earnings have been expended for the benefit of the trust property, then all receiver's debts and operating expenses must be paid out of the proceeds of sale of the trust property.

We believe these propositions cover the main questions involved in the case at bar. If they have been satisfactorily established, the appellants can not succeed.

Respectfully submitted,

McDONALD & BUTLER,

By JOHN M. BUTLER.

Indianapolis, Ind., December 5, 1878.